Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

ROBERT BISACCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Robert Bisaccia seeks relief from the Second Circuit's affirmance of the District Court's denial of a Certificate of Appealability. Bisaccia contends that the Court of Appeals and the District Court reached this result only by misapplying and misinterpreting well-established precedents of this Court regarding: his trial counsel's ineffective assistance of counsel and actual conflict, denial of Petitioner's right to a fair trial and right to confrontation due to *Brady* violations; and his illegal sentence. Specifically, Bisaccia seeks review of the following questions:

1. Did the Second Circuit act contrary to *Blakely v. Washington* and *Lewis v. United States* when it failed to correct Petitioner's sentence even though he was sentenced under the wrong guideline and for the underlying crime of first degree murder when the jury found him guilty of second degree murder.

2. Did the Second Circuit commit legal error in rejecting Bisaccia's *Brady* claim – that the prosecution suppressed material witness impeachment evidence that prejudiced petitioner on the ground that petitioner failed to present a sufficient showing, even though the Court refused to grant a hearing or any discovery on the issue and the material witness was indicted for the suppressed crime.

3. Did the Second Circuit commit legal error when it failed to issue a certificate of appealability based on trial counsel's actual conflict and ineffective assistance of counsel on the following grounds:

(a) trial counsel did not have a conflict of interest notwithstanding the fact that, like in *Armienti v. United States*, 313 F.3d 807, 881 (2d Cir. 2002), trial counsel had just been investigated by the same office that was prosecuting his client and the same judge that was presiding over his client's trial; and

(b) Defense counsel's failure to call witnesses to aid in his client's defense was strategic and not prejudicial despite the fact that the record did not conclusively show that the petitioner was not entitled to relief and counsel's action largely occurred outside of the presence of the trial judge but no hearing was granted to flush out these issues.

(c) Defense counsel's failure to object to petitioner's sentence was not error, despite the fact that petitioner's sentence violated the ex post facto clause of the United States Constitution and Bisaccia was sentenced for first degree murder when the jury convicted him of second degree murder.

4. Did the Second Circuit act contrary to *Miller-El v. Cockrell*, 537 U.S. 322 (2003) in denying Bisaccia's application for Certificate of Appealability.

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Appendix C — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated April 12, 2000 .... 40a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Court of Appeals order denying certificate of appealability is published at Appendix A. The District Court's opinion, denying a certificate of appealability, is dated June 12, 2003 and reported at 268 F. Supp. 2d 168 (Appendix B). The District Court's order, dated April 12, 2000, is published at Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and Order on February 11, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). On May 10, 2004, petitioner's application to extend time to file a petition for a writ of certiorari from May 11, 2004 until July 10, 2004 was granted by Justice Ginsburg.

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a public and speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend VI.

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. Art. 1 § 10.

STATEMENT OF THE CASE

Petitioner Robert Bisaccia, ("Bisaccia") was charged in Indictment Criminal Number 93-0848. This indictment charged Bisaccia with Conspiracy to Murder pursuant to 18 U.S.C. § 1952B(a)(5) (1984) and 3551, *et seq*. and Murder pursuant to 18 U.S.C. § 1952B(a)(1) (1984), 2 and 3551, *et seq*. On June 15, 1995 the Honorable Leo I. Glasser, U.S.D.J. sentenced Bisaccia under the United States Sentencing Guidelines to life imprisonment.

The Government's case against Bisaccia resulted from their notorious cooperation agreement with Salvatore "Sammy the Bull" Gravano. Indeed the government's entire case rested upon the word of Gravano.

At the time of Bisaccia's trial he was represented by Joel Winograd. Unbeknownst to Bisaccia, Winograd had been disciplined, disbarred, and then recently reinstated by Hon. Leo I. Glasser, who was the presiding judge during Bisaccia's trial. Bisaccia later learned that Winograd had been investigated for alleged obstruction of justice and subornation of perjury in a case tried before Judge Glasser. In September of 1988, Winograd entered into a plea agreement wherein he

plead guilty to tax evasion in exchange for the dismissal of the remaining charges. He was removed from the list of attorneys eligible to practice by Judge Glasser on May 24, 1989. He was reinstated in the Eastern District on May 29, 1992 less than one year before Bisaccia was indicted.

In addition, co-counsel's attorney, Carnisi, was representing another defendant charged with the same murder in the Southern District of New York. During trial, an issue arose whereby Carnisi alerted the Judge that the FBI agent who was testifying had testified differently in a meeting in connection with the Southern District case. Winograd failed to seek to have Carnisi disqualified even though he knew that Carnisi had information which would impeach the Government's witness.

Petitioner submits that his counsel had an actual conflict of interest and that the District Court and the Court of Appeal failed to apply the standard as set forth in *Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000).

Winograd also failed to object to Bisaccia's sentence which clearly violates the dictates of the ex post facto clause of the *Constitution* of the United States of America. Specifically, Winograd failed to object when the court applied the 1993 Sentencing Guidelines Manual which resulted in a higher sentence than would have been imposed if the 1988 manual, which was in effect when the crime was committed, was used.

Winograd also failed to call a defense witness, whom he promised to call in his opening statement, because he had failed to subpoena said witness and the government did not call him. Winograd also told Bisaccia that a crucial defense witness could not be located because she had given a fake social security number. Bisaccia later learned that the social security number was correct and that she could have been called to testify had Winograd bothered to find her. These witnesses provided crucial evidence that would have been beneficial to Bisaccia and could have further been used to impeach the testimony of the Government's witnesses.

Petitioner submits that his Sixth Amendment right to counsel was violated by his trial counsel's ineffectiveness and further that the Second Circuit erred in failing to apply the standards as set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Finally, Petitioner has recently learned that Gravano, the government's sole witness, has been indicted for killing a New York City Police Officer, which event happened prior to Bisaccia's trial. Petitioner submits that the District Court should have permitted discovery into this newly discovered evidence so that petitioner could ascertain whether a Brady violation had occurred.

As noted above, the District Court did not agree nor did the Second Circuit Court of Appeals.

REASON FOR GRANTING THE PETITION

The petition should be granted because the Second Circuit Court of Appeals has sanctioned the District Court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and has decided an important federal question, the sentencing of a defendant for a crime not charged to or found by the jury, in a way that conflicts with relevant decisions or this Court. In addition, the District Court and Court of Appeals decision is in direct conflict with decisions of other circuits and there is a split in the Second Circuit.

I. A Writ Of Certiorari Should Issue Because Petitioner's Sentence Is Illegal Under This Court's Mandate In *Blakely* And Because The District Court And Court Of Appeals Decision Is In Direct Conflict With Decisions Of Other Circuits And There Is A Split In The Second Circuit

In conjunction with the § 2255 litigation, Mr. Bisaccia filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure regarding the sentence imposed in his case and the district court's failure entirely to consider the constitutionality of that sentence both alone and as an example of ineffective assistance of counsel.

Mr. Bisaccia raised the errors concerning his sentencing in the context of the Fifth and Sixth Amendments (Grand Jury Clause, Ex Post Facto Clause, Due Process, and Ineffective Assistance of Counsel). The errors were as follows: (1) Mr. Bisaccia was charged with second degree murder under New York law. The jury was expressly

instructed that it need not find premeditation and that that concept was completely irrelevant to the charge. However, at sentencing, when selecting the federal analog for Federal Sentencing Guidelines purposes, the district court chose the Guideline for federal first degree murder which, at the time of the crime in this case, was directly at odds with that jury instruction and stated a different crime entirely from the crime of conviction. The lower courts completely ignored authority from other Circuits directly on point[1] in considering the substantive issue and in considering whether a Certificate of Appealability should be granted under the *Miller-El* standard. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Such action simply was impermissible as a matter of law.

Now, of course, this Court's June 24, 2004 decision in *Blakely v. Washington* is directly relevant and would seem to make it perfectly clear that it was constitutionally impermissible for the district judge to first instruct the jury that premeditation was not at all relevant to their consideration and that they should not consider it and then

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1. *See, e.g., United States v. Hanson*, 264 F.3d 988, 996-98 (10th Cir. 2001) (refusing to allow sentencing enhancement for first-degree murder where plea was for non-premeditated murder, even where facts arguably established premeditation); *United States v. Kelly*, 1 F.3d 1137, 1140-41 (10th Cir. 1997) (Accord); *United States v. Barber*, 199 F.3d 276 (4th Cir. 1997) (*en banc*). Indeed, the lower courts here not only ignored the split with the Tenth Circuit, which alone satisfies the *Miller-El* standard for a COA, it ignored the conflict among Second Circuit panels on this very issue. *Compare United States v. Minicone*, 960 F.2d 1099, 1110-11 (2d Cir.), *cert. denied*, 503 U.S. 950 (1992) *with Jamison v. United States*, 4 Fed. Appx. 88 (2d Cir. 2001) (remanding for consideration of whether it was ineffective for counsel to have failed to argue for sentencing under the second degree murder Guideline for a conviction under New York Penal law's second degree murder).

to sentence Mr. Bisaccia under a Guideline which, at the relevant time, applied only to a premeditated murder. 2004 U.S. Lexis 4573 (June 24, 2004). At a bare minimum, the decision in *Blakely* (if the direct split with another circuit did not), certainly raises the matter to a level which is "debatable among jurists" under the *Miller-El* standard, such that a Certificate of Appealability had to be granted by the circuit court.

Additionally with respect to sentencing, the district court erred by sentencing Mr. Bisaccia under a Guideline that was not even in effect at the time of his alleged crime. The court sentenced Mr. Bisaccia under U.S.S.G. § 2A1.1, the Guideline applicable to first degree murder. The crime charged in this case was alleged to have occurred on May 3, 1988. Prior to November 1, 1990, unless a person were convicted of the crime of first degree murder (defined as premeditated murder), only U.S.S.G. § 2A1.2, the Guideline applicable to second degree (non-premeditated) murder could be applied.[2]

The lower court's error in this regard is particularly inexplicable where, as we learned through our investigation in connection with the § 2255 motion, the prosecutor in this case was the prosecutor in another case in the very same district in which the same probation office involved here expressly noted in a presentence report that it could not apply

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2. Under U.S.S.G. § 1B1.11(b)(1), the sentencing court must use the Guidelines Manual in effect on the date the offense of conviction was committed, if the use of any other Guideline Manual would result in an increased punishment. To do otherwise would violate the *Ex Post Facto* Clause. By using the inapplicable Guideline here, Mr. Bisaccia was sentenced to life in prison. Under the Guideline actually in effect at the time of the crime at issue, the sentencing range would have been from 168 to 210 months.

U.S.S.G. § 2A1.1 to a New York Penal law second degree murder that occurred prior to November 1, 1990, and that to do so would violate the *Ex Post Facto* Clause. That case, *United States v. Failla*, E.D.N.Y. Docket No. 93-CR-294 (CPS) pre-dated Mr. Bisaccia's case by less than a year. The prosecutor was the same as the prosecutor in Mr. Bisaccia's case, so this error was well known to him, yet no one raised it for Mr. Bisaccia. In addition, as noted above, Mr. Bisaccia's trial counsel had been disbarred and during that proceeding had admitted to having had a complete breakdown which caused him to not handle his responsibilities effectively. One can only assume, based on what must have been a complete failure to read the presentence report, that he was still suffering from the effects of that breakdown.

The lower court's failure to grant a COA on this issue under the *Miller-El*'s "debatable among reasonable jurists" test, in light of the split among the Circuits, the division within the Second Circuit itself, the lower court's action in a case in the very same district, and so on, cannot withstand scrutiny. Its underlying action with respect to sentencing clearly was unconstitutional under the above-noted constitutional provisions and under the authority from this Court set out, *inter alia*, in *Ring v. Arizona*, 536 U.S. 584 (2002)[3] and *Lewis v. United States*, 523 U.S. 155 (1998) and now in *Blakely v. Washington*, 2004 U.S. Lexis 4573 (June 24, 2004).

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3. Mr. Bisaccia is aware, in light of this Court's recent decision in *Schriro v. Arizona Dept. of Corrections*, 2004 U.S. Lexis 4574 (June 24, 2004) that *Ring* will not be applied retroactively to cases already final on direct review.

II. A Writ Should Issue As The Court Of Appeals And District Court Failed To Follow This Court's Mandate In *Brady* And *Banks v. Dretke*

Gravano's biography discloses that he had a secret deal with his lead prosecutor that he would not have to testify against any member of his "crew". In order to effectuate this, the government would ensure that no member of his crew got indicted during the period of time in which he was committed to testify. One can easily see how this is important impeachment material since Gravano may have "substituted" non-members for members of his crew when disclosing information about crimes to the government.

In addition, the Bergen County Prosecutor's Office has recently indicted Salvatore "Sammy the Bull" Gravano in the murder of New York City Police Officer Peter Calabro. This murder was not disclosed to the Defense during the trial of Mr. Bisaccia. This is relevant in two ways. First we will examine the relevance if the government did know, or should have known about the murder.

Salvatore Gravano was the Governments' star witness in implicating Mr. Bisaccia in this murder. He was also the Government's only way to bring down John Gotti, the real aim of the Government's dealings with Gravano. To this end, the Government agreed to give Gravano a "pass" on some 19 murders. It is unlikely that Gravano would admit 19 murders to the Government but not disclose the 20th. Gravano knew that he was getting a free pass and that the Government needed his testimony to bring down Gotti. Therefore, it is unlikely that he would have been afraid of losing his deal if he admitted to ordering the murder of Officer Calabro. If Gravano did reveal his crime to prosecutors, then the

Government had a duty to disclose this crime to Defendant. If the jury knew that Gravano had killed a New York City police officer, they likely would have evaluated his testimony against Mr. Bisaccia in a very different manner. The Government knowing this may have not disclosed this crime to the Defense in an attempt to hide it from Defense attorneys not only in this case, but in the case against John Gotti as well.

If, on the other hand, the Government knew or should have known of Gravano's involvement in the slaying of Officer Calabro, then a serious Brady violation has occurred. A *Brady* prosecutorial misconduct claim has three essential elements. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) *Brady v. Maryland*, 373 U.S. 83 (1963). The first such element—that the evidence at issue be favorable to the accused as exculpatory or impeaching—is satisfied here. Gravano's involvement in the killing of a New York City police officer and Gravano's alleged deal with the prosecution that he not have to testify against any of the members of his "crew" was clearly advantageous to Petitioner as impeachment material. Corresponding to the second *Brady* element—that the State suppressed the evidence at issue—a petitioner shows cause when the reason for the failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence. Coincident with the third *Brady* component—that prejudice ensued—prejudice within the compass of the "cause and prejudice" requirement exists when suppressed evidence is "material" for *Brady* purposes. *Ibid.* Thus, if Petitioner is successful in demonstrating cause and prejudice, he will also succeed in establishing the essential elements of his *Brady* claim. *See Banks v. Dretke*, 2004 WL 330040 (Feb. 24, 2004).

At a minimum, the Defense should have been entitled to a hearing to determine what the Government knew in relation to the Calabro murder and Gravano's involvement in same and also the agreement that Gravano alleges exists that he would not have to testify against his "crew".

These issues clearly rise to the level as asserted in *Miller-El* that "the issues presented were adequate to deserve encouragement to proceed further." 537 U.S. 322, 336 (2003). Defendant's right to a fair trial and right to confront witnesses are clearly implicated. Thus, if the lower courts had followed this Court's mandate in *Miller-El*, a certificate of appealability should have issued.

III. A Petition Should Issue Because The District Court And Appellate Court Failed To Follow This Courts Mandate In *Armienti v. United States* And In Violation Of Defendant's Sixth Amendment Rights

A defendant will have suffered ineffective assistance of counsel in violation of his Sixth Amendment rights "if his attorney has a 'per se' conflict, a potential conflict of interest that results in prejudice to the defendant, or an actual conflict of interest that adversely affects the attorney's performance." *Armienti v. United States*, 313 F.3d 807, 811 (2d Cir. 2002). When counsel is burdened by an actual conflict of interest that adversely affects performance, the Defendant is not required to demonstrate prejudice; prejudice is assumed. *United States v. Levy*, 25 F.3d 146, 157 (2d Cir. 1994). The Court of Appeals has noted that a factor which has contributed to a finding of an actual conflict of interest was trial counsel's own investigation by the same United States Attorney's Office that was prosecuting his client. *Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000). Such is precisely the case

in the instant case[4]. What makes matters worse, is that the conduct for which Joel Winograd, Defendant's trial counsel, was investigated, happened in a trial before Hon. I. Leo Glasser, the same judge who sat at trial and has handled all of the post-trial submissions. In May of 1986, an investigation of Winograd was launched by the Eastern District Organized Crime Strike Force, for Winograd's alleged obstruction of justice and subornation of perjury involved a case tried before Judge Glasser. Evidence found during that investigation led to the discovery that Winograd had not paid income tax for an eleven year period. In September of 1988, the government entered into a plea agreement with Mr. Winograd wherein he plead guilty to one count of tax evasion in exchange for their dropping the obstruction of justice charge and subornation of perjury charge. Winograd was sentenced to a fine, five years of probation, and community service. He was subsequently removed from the list of attorneys eligible to practice in the Eastern District of New York by Judge Glasser on May 24, 1989. He was reinstated to the New York bar on December 19, 1991 and to the Eastern District on May 29, 1992. Bisaccia was indicted on April 29, 1993, less than one year later. Certainly, Mr. Bisaccia would not have retained Mr. Winograd had he been aware of the above circumstances. It would be absurd to retain an attorney to try a case in front of the same Judge by which he was disciplined. The above circumstances reach the level of an actual conflict, and as such, Defendant is entitled to the relief requested in this application.

In addition, an actual conflict arose due to Defendant's co-defendant's counsel's (Carnisi) representation of another

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4. The case was captioned *United States v. Cunningham*, 81 CR 480 (E.D.N.Y. 1982).

defendant in the Southern District of New York who had been indicted on the same murder. During the trial, an FBI agent (Petrouskie) took the stand to testify. Carnisi went to side bar and alerted the Judge that the same FBI agent had testified differently in meetings at which Carnisi was present during his representation of Mennino (who was also charged with the murder of Oliveiri) in the Southern District. Before Winograd could finish his objection, Judge Glasser denied his motion for a mistrial which had not even been fully made. Based upon discovering the conflict in the middle of trial, Winograd should have sought to have Carnisi disqualified and rather, subpoenaed as a witness to impeach the credibility of the FBI agent.

As another example of Petitioner's trial counsel's inexplicable ineffectiveness, during trial, Defense counsel failed to call witnesses who would have established, at a minimum, reasonable doubt as to Bisaccia's involvement in the Oliveiri murder. There existed at least three witnesses who contradicted the government's primary witness, Gravano, as to how the murder occurred, who was involved, and the descriptions of persons standing over the body after the fatal shots were fired. Annie Gonzalez and Mr. Rodriguez gave descriptions of what occurred at the scene which were markedly different from the government's version of events. Gonzalez indicated to the police that she observed a "Blonde, blue eyed man, about 35" at the time of the murder. She also confirmed to her friend, Elizabeth Vasquez that she was in fact an eyewitness to the murder. Rodriguez' account directly would have contradicted Gravano insofar as the number of people involved and the number of getaway cars. This point becomes even more significant in light of the jury sending out a note requesting a read back of Gravano's testimony on the number of vehicles actually observed at the time of the

shooting. The jury, without Rodriguez's account, was deprived of hearing this contradiction which certainly would have further weakened the creditability of Gravano's testimony against Bisaccia.

Jerry Farrell, another eyewitness, was interviewed by the FBI and never called to testify by the defense despite his being shown photographs of Bisaccia and his co-defendant, Stantini and informing the government that neither man was at the murder scene. In fact, Farrell confirmed that Gravano and a person by the name of Mennino, who was represented by Stantini's trial counsel, Charles Carnisi, and was also convicted of participation in this very murder in the Southern District of New York, were the two men involved in the shooting. To succeed on a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance fell below "an objective standard of reasonableness" under prevailing professional norms" and that "but for counsel's unprofessional conduct," there "is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilty." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Regarding the first prong of the test, the "reasonableness of the attorney's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

There can be no justification for Winograd's decision not to call the aforementioned witnesses to impeach the testimony of the Government's witnesses. One can only speculate what would be Winograd's reason for failing to present witnesses to impeach the testimony of the government witnesses since no hearing was ever held with respect to the alleged errors. Winograd's actions are equally indefensible

when it comes to his delivering an opening statement to the jury about a specific witness coming in to testify on his client's behalf, and then not subpoenaing that very person to testify at trial. Farrell's name was referenced during the trial seventeen times without the defense countering with him as a witness. It is clear from these facts alone that a hearing should-have been afforded to Petitioner to further develop these inexcusable mistakes. The Government Attorney took full advantage of Farrell's nonappearance and remarked during closing argument that if this witness did in fact possess contradictory information, then you would have seen him in the witness chair. This critical flaw alone would justify granting the relief sought by Bisaccia.

The trial transcripts confirm that Winograd's actions were not a product of his trial strategy but rather, an inexcusable mistake. More specifically, as to Winograd's failure to call Farrell, the trial transcripts show that both trial attorneys clearly intended to call him as a witness but their failure to have a subpoena issued by the Court procedurally barred their right to compel him to appear. When the Judge inquired as to whether or not defense counsel had subpoenaed him, defense counsel provided no reasonable explanation as to why that had not been done. The Jury was told that the Defense would call a witness to directly refute the government's story, and then the Defense called no such witness. This inaction created the appearance that no such evidence existed. This directly and negatively affected the overall credibility of the Defense and caused irreparable harm to the Defendant during trial. These errors destroyed the Defenses' credibility with the jury and as such, trampled upon Defendant's constitutional rights. In light of the foregoing, and at a minimum, a Curcio hearing should have been held to determine the existence of the conflict and/or the reasons

for Winograd's failure to call several witnesses crucial to Defendant's case.

Furthermore, in *Armienti v. United States*, the Second Circuit noted that where "the motion and the filed and the records of the case' do not 'conclusively show that [the petitioner] is entitled to no relief" and where the issues "implicate actions taken by counsel outside the presence of the trial judge" such issues ordinarily should not be resolved without a hearing. 234 F.3d 820, 825 (2d Cir. 2000). The Second Circuit failed to follow its own holdings in denying Petitioner's appeal from the District Court's denial of his Certification of Appealability. The conflicts of interest were abundant in the trial level proceedings of Petitioner. First, Bisaccia's counsel failed to disclose that he had been disciplined for events arising from a total breakdown, by the very trial judge before which he was appearing for Bisaccia's trial. Next, Bisaccia's co-defendant's counsel was representing another defendant in a different district who was on trial for the same murder as Petitioner and his co-defendant. This created a conflict which precluded Bisaccia from asserting all of his defenses.

Despite this substantial showing and the mandates of *Armienti, supra*, the District Court would not even permit a hearing to further explore these issues which implicate Petitioner's Sixth Amendment rights.

IV. A Petition For Writ Of Certiorari Should Be Granted Because Defendant The Second Circuit Court Of Appeals Has Sanctioned The District Court's Departure From The Accepted Course Of Judicial Proceedings In Failing To Analyze Petitioner's Certificate Of Appealability Under The Proper Standard

This Court in *Miller-El*, wrote that a COA should be issued "where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" *Miller-El*, 537 U.S. at 336. The Court further explained that under this standard, a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* The Court further explained that a reviewing court should take "an overview" of the claims in the petition and make a "general assessment" of their merit, while asking whether a resolution in the lower court could be "debatable among jurists of reason." *Id.* at 336. The Court made clear that the reviewing court is simply to engage in a "threshold inquiry" which neither requires nor permits a "full consideration of the factual or legal bases adduced in support of the claims." *Id.*

The Court expressly wrote that "a COA does not require a showing that the appeal will succeed." *Id.* at 337. Accordingly, as the Court wrote, "a Court of Appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* Indeed the Court held that it would be wrong for an appellate court to deny a COA, and therefore deny appellate review, because a prisoner "did not convince a judge, or, for that matter, three judges, that he or she would

prevail." *Id.* The court expressly noted that it is perfectly consistent with the standard set out in § 2253 that "a COA will issue in some instances where that is no certainty of ultimate relief." *Id.*

While granting a COA requires that the movant prove "something more than the absence of frivolity or the existence of mere 'good faith' on his or her part," the movant is not required to prove, in order to have his COA granted, "that some jurists would grant the petition for habeas corpus" *Id.* at 338. The Court further explained that a claim can be "debatable," as that term is used in this context, "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Finally, in further emphasizing its point, the Court criticized the approach taken by the court of appeals in *Miller-El* and wrote that the proper inquiry should have been whether the movant made a "substantial showing of the denial of a constitutional right" and not whether he ultimately had convinced the court of his right to prevail on the merits. *Id.* at 342. The Court reiterated that it was error to decide, in effect, the substance of an appeal in the context of considering an application for a COA. Such a manner of preceding the Court wrote, "undermines the concept of a COA" by making an evaluation of the merits of the substantive issues in a process which should be simply a "threshold inquiry." *Id.* at 342. The question, the Court in *Miller-El* wrote, is the "*debateability* of the underlying constitutional claim, not the resolution of that debate." *Id.* (Emphasis added)

Petitioner has more than met threshold for a certificate of appealability to issue. For the following reasons, it is clear that the Court of Appeals and District Court failed to follow this Court's mandate as set forth in *Miller-El*.

CONCLUSION

The foregoing issues and other constitutionally significant issues raised below clearly demanded a discovery and an evidentiary hearing below under all applicable standards for the same. The underlying constitutional issues were wrongly decided on the merits as well, they are pressing issues of the day, likely to arise in and effect many other criminal defendants, and they reflect an irreconcilable split of authority among the Circuits and an impermissible transgression of clear authority from this Court on these exact subjects. Therefore, Petitioner's application for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. IACULLO
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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED FEBRUARY 11, 2004

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of February two thousand four,

Present:

Hon. Dennis Jacobs,
Hon. Robert D. Sack,
Hon. Reena Raggi,
Circuit Judges.

03-2559

Robert Bisaccia,

Movant-Appellant,

v.

United States of America,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The

appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 12, 2003

United States District Court,
E.D. New York.

Nos. 97 CV 3659(ILG), 97 CV 6683(ILG).

Orazio STANTINI,

Petitioner,

v.

UNITED STATES of America,

Respondent.

Robert **Bisaccia**,

Petitioner,

v.

United States of America,

Respondent.

June 12, 2003.

MEMORANDUM AND ORDER

GLASSER, District Judge.

The petitioners have filed applications with this Court seeking Certificates of Appealability which would enable them to appeal this Court's Memorandum and Order reported in 2000 WL 10314. They have also filed motions

pursuant to Fed.R.Civ.P. 59(e) and 60(b) addressed to that Memorandum and Order. The background of these proceedings has been set forth in varying degrees of detail and on various issues over a period of 8 years and reported in *United States v. Bisaccia*, 1995 WL 228397 (E.D.N.Y.1995), *aff'd*, *United States v. Stantini*, 85 F.3d 9 (2d Cir.1996), *cert. denied*, *Bisaccia v. United States*, 519 U.S. 1000, 117 S.Ct. 498, 136 L.Ed.2d 390 (1996); *Bisaccia v. United States*, 1997 WL 803721 (E.D.N.Y.1997); *Stantini v. United States*, 986 F.Supp. 736 (E.D.N.Y.1997), denied in part and remanded, *Stantini v. United States*, 140 F.3d 424 (1998); *Bisaccia v. United States*, 2000 WL 703014 (E.D.N.Y.2000); *Bisaccia v. United States*, 2000 WL 1677747 (E.D.N.Y.2000).

Familiarity with the foregoing will be presumed.

BACKGROUND

Although I have presumed that the reader is familiar with the numerous prior proceedings in this case, perhaps I should also presume the unlikelihood that they will be accessed and read and that a summary historical evolution of this case would be useful.

Stantini and Bisaccia were convicted of conspiring to murder and murder following a jury trial in November, 1993. Stantini was subsequently sentenced to a term of imprisonment of 324 months and Bisaccia to life in prison. The victim was Francesco Oliveri who was murdered in retaliation for a murder committed by Oliveri's sons of a made member of the Gambino Organized Crime Family.

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Participating in executing that homicide were Bisaccia, Stantini, Lorenzo Mannino, Joseph Gambino and Salvatore Gravano.

Mannino and Gambino were charged with the Oliveri murder in the Southern District of New York. Their trial began in January 1993, and ended in a mistrial in June 1993. Mannino was represented by Charles Carnesi. Because Carnesi had been under investigation by the United States Attorney in that district, a *Curcio* hearing was held to ascertain whether he could serve as Mannino's counsel free from conflict. At that hearing Mannino was represented by Alan Futerfas and at the conclusion of it Carnesi was permitted to continue to serve.

Stantini and Bisaccia were indicted in this district in April, 1993. The other participants in the murder were named as unindicted co-conspirators. Stantini was represented at trial by Carnesi. Bisaccia was represented by Joel Winograd and George Abdy. As had been noted, they were both found guilty at the end of a six day trial in November 1993.

Mannino and Gambino were re-tried after Bisaccia and Stantini were convicted, but before they were sentenced. In that interval, Stantini moved for a new trial pursuant to Rule 33 Fed. R. Cr. P. and to set aside his conviction pursuant to 28 U.S.C. § 2255. That motion was based upon his claim that Carnesi, representing both him and Mannino, was conflicted and thus was restrained from representing him effectively. Bisaccia claimed that he was also prejudiced by Carnesi's ineffectiveness and he joined in that motion. Their motions were denied without a hearing in 1995 WL 228397, *supra*.

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Stantini and Bisaccia then appealed their conviction and sentence and the denial of their post-conviction motions. Stantini was represented on appeal by Futerfas and Bisaccia by David Lewis of the Legal Aid Society. The Court of Appeals affirmed the conviction and denials in 85 F.3d 9 and certiorari was denied in 519 U.S. 1000, 117 S.Ct. 498, 136 L.Ed.2d 390 in 1996.

In the following year, 1997, Bisaccia and Stantini filed separate motions pursuant to 28 U.S.C. § 2255. Stantini re-asserted Carnesi's ineffective assistance and Futerfas' ineffectiveness in failing to establish it on appeal. Stantini also added a violation of *Brady* claim and new assertions of Carnesi's ineffectiveness. On this motion, Stantini was represented by his present counsel, David Schoen.

Bisaccia revived his previous claims of Winograd's ineffectiveness and, like Stantini, claimed his appellate counsel was ineffective in failing to establish that. He, too, added a violation of *Brady* claim alleging that the government wrongfully withheld information which could have been used to impeach Gravano (a cooperating witness at trial) and which was also exculpatory. He was represented by new counsel, Robin Kay Lord.

This Court noting that the first post-conviction motion was styled as being pursuant to Rule 33 and § 2255, regarded this motion as a second and successive one and transferred it to the Court of Appeals in accordance with *Liriano v. United States*, 95 F.3d 119 (2d Cir.1996) for a determination of whether it should be permitted to be filed. *See*, 986 F.Supp. at 739, *supra*. The defendants not having been sentenced

when the first motion was decided, the Court of Appeals held that this motion was not second or successive pursuant to § 2255 and re-transferred it. 140 F.3d 424, *supra.*

In connection with the return to this Court, extensive briefs were submitted by the parties which addressed the issues initially raised in those motions and added new motions to disqualify the Court pursuant to 28 U.S.C. § 455 and for discovery and inspection. In the opinion reported in 2000 WL 703014, *supra*, those motions and the § 2255 motion were denied. Stantini's and Bisaccia's claims of ineffective assistance by their respective counsel were rejected as were their *Brady* claims.

On May 1, 2000, Stantini moved for reconsideration of this Court's opinion or, in the alternative, for relief pursuant to Rules 59(e) and 60(b). Bisaccia joined in this motion. This motion was bottomed upon the claim that Stantini's sentence was based upon a flawed guidelines application in violation of the Ex Post Facto Clause of the United States Constitution. In a letter submission dated August 2, 2000, Stantini claimed that his sentence ran afoul of *Apprendi.* Once again, this Court, for the reasons given in 2000 WL 1677747, *supra*, viewed this motion as a second or successive § 2255 motion and referred it to the Court of Appeals. The Court of Appeals in *Stantini v. United States*, 986 F.Supp. 736 (2d Cir.2001), "Ordered that the portion of the authorization motion seeking to raise claims . . . in petitioner's Fed.R.Civ.P. 60(b) motion is dismissed as unnecessary and the case is transferred [to this Court] for further consideration in light of . . . *Rodriguez v. Mitchell*, 252 F.3d 191, 198-200 (2001)" (holding that a Fed.R.Civ.P. 60(b) motion should not be construed as an

application to file a second or successive 28 U.S.C. § 2254 petition). The Court of Appeals further ordered "that the portion of the authorization seeking to raise a new claim is denied because the claim is not based on newly discovered evidence or on a new rule of constitutional law. *See* 28 U.S.C. § § 2255, 2244(a), (b)." A precisely similar mandate was issued by the Court in *Bisaccia v. United States* on June 20, 2001.

Stantini did not withdraw his Rule 59(e) motion to alter or amend the judgment. That motion must be made within ten days of the judgment, a limitation which is strictly construed and is jurisdictional and cannot be extended in the discretion of the Court. *Lichtenberg v. Besicorp Group, Inc.* 204 F.3d 397 (2d Cir.2000). Because the motion was not timely filed, it is barred. The government is correct in also calling attention to the Mandate of the Court of Appeals remanding the case for consideration by this Court of the Rule 60(b) motion only. A consideration of the Rule 59(e) motion is, therefore, beyond the Mandate's scope. *See United States v. Quintieri*, 306 F.3d 1217 (2d Cir.2002).

This application for a Certificate of Appealability was filed on November 6, 2001. Oral argument was heard on January 11, 2002, following briefing by all sides. Thereafter, further letter submissions on behalf of Stantini were received dated August 14, 2002, October 29, 2002, January 17, 2003, February 13, 2003 and February 25, 2003. The last submission requesting that the Court conduct a "full and thorough inquiry" based upon an indictment of Gravano in New Jersey was denied in a Memorandum and Order dated March 3, 2003.

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Letters on behalf of Bisaccia, dated November 7, 2002, January 23, 2003 and February 27, 2003, advised that he joined in Stantini's submissions.

Stantini has requested that a "Writ of Mandamus" issue from the Court of Appeals averring that this proceeding has remained dormant since January 11, 2002. As has been indicated, submissions in this matter have continued to be received by this Court as recently as February 27, 2003. If Speedy Trial Act considerations are analogous, the time during which motions are pending is excluded until all submissions are in. *See, e.g., United States v. Shakur*, 1987 WL 12404 (S.D.N.Y.1987), *United States v. Piasecki*, 969 F.2d 494, 500 (7th Cir.1992) ("Once a motion is filed . . . the excludable delay continues . . . until the submissions necessary for the court to reach a decision are complete.") The submissions continued to apprise the Court of recently decided cases the petitioners believed were important for me to consider in arriving at a decision on their motions.

In his three page letter of August 14, 2002, counsel called the Court's attention to three cases decided by the Court of Appeals for this circuit. He communicated his understanding of them to be that a district court should allow a § 2255 litigant to freely amend his claims to permit a "full and fair shot at litigating [them] on collateral review." He also supplemented his argument that the sentencing guidelines were erroneously applied to Stantini by the citation of five additional cases and his summary of them.

In his four page letter of October 29, 2002, he advanced further arguments in support of the guidelines issue.

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In his two page letter of February 3, 2003, he continued "with his practice of writing to bring to the Court's attention (without extensive argument) recent decisions which are relevant to issues before this Court. . . ."

And, finally, in a six page letter dated February 25, 2003, he requested a "full independent inquiry discovery and an evidentiary hearing" prompted by events described in that letter. As has been indicated, his request was denied in a Memorandum and Order dated March 3, 2003.

His application for a writ of mandamus would suggest that the submissions are now complete.

Discussion

I. *Certificate of Appealability*

Five issues require consideration for a determination of Stantini's and Bisaccia's application for a Certificate of Appealability ("COA") and they will be addressed in order in which they are listed in Stantini's Application ("SA") at 2-3.

(1) *Their Disqualification Motion*

The initial inquiry in this regard must be whether a COA can properly be issued and the answer is to be found in 28 U.S.C. § 2253(c) which provides in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals from

* * * * * *

(B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The motion for my disqualification was made "pursuant to 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment to the United States Constitution." SA5. The gravamen of his claim to entitlement of a COA as regards the denial of this motion would appear to be the disregard of his request that this motion be decided before consideration was given to the other claims upon which his § 2255 motion rested so that in the event it was denied, he could seek a writ of mandamus compelling my recusal. The disregard of that request gives rise to no constitutional infirmity of which this Court is aware, nor has Stantini provided any authority that it does. In *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), the Court wrote ". . . most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar." (Internal citations omitted).

In 2000 WL 703014, *supra*, at *1 n. 1, I wrote that the "recusal motion gives every appearance of being untimely," given the law of this Circuit requiring that such motion be

made "at the earliest opportunity" after bias is ascertained, citing *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir.1991). The merits of the motion were addressed nevertheless "in order to demonstrate, even more conclusively than the law strictly requires, that both justice and its appearance will be honored in the adjudication of the motion. . . ." The merits of the motion were fully considered and that consideration compelled the Court to conclude that there weren't any and that it must be denied. The applicants have failed to make a substantial showing, indeed, they made no meaningful showing at all, that the denial of this motion was constitutionally wanting.

2(a). *The Denial of the Request for Discovery*

The applicants moved for discovery pursuant to Rule 6(a) of the Rules Governing Section 2255 Proceedings and for an evidentiary hearing on their claims. Rule 6(a) provides that discovery may be granted "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

To begin with, "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). The Court then equated the "good cause" standard of Rule 6(a) with an assessment of the discovery request as follows, quoting *Harris v. Nelson*, 394 U.S. 286, 299, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969): "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is

. . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." 520 U.S. at 908-909, 117 S.Ct. 1793.

In the denial of their discovery request, the court was unable to discern any showing of specific allegations which would even remotely suggest the development of facts that would demonstrate an entitlement to relief. Instead, the court concluded "that the petitioners have done little more in their voluminous submission . . . than offer speculative variations on the ineffective assistance claims already specifically addressed and rejected by both this court and the Court of Appeals." 2000 WL 703014*6.

Stantini's invocation of *Bracy* as providing comfort for his position is misplaced. Bracy was convicted of murder and sentenced to death by a state court judge who was later convicted on federal charges of taking bribes from criminal defendants in other cases in which they were charged with murder. Bracy sought to show that the acceptance of bribes in those cases rendered him actually biased against the state, but also induced a compensatory bias against defendants who did not bribe him to create the appearance that he wasn't "soft" on criminal defendants. In that context, the Court found that Bracy showed good cause for his request for discovery of trial transcripts, depositions of the judge's associates and the judge's rulings to show a pattern of bias. On the facts of that case, the Court held that the primary presumption that public officials have properly discharged their official duties was not applicable. No effort is made by Stantini to even suggest the existence of a relationship between those facts and the facts in this case. Nor have the applicants succeeded

in making a "substantial showing" that the denial of their discovery motion deprived them of a constitutional right.

2(b). *The Denial of an Evidentiary Hearing*

§ 2255 provides in part:

> Unless the motion and the files and records of a case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . .

In denying their application for an evidentiary hearing, I wrote that § 2255 does not entitle the petitioners to an evidentiary hearing as a matter of right. I then concluded that the record conclusively showed that a hearing was requested for the sole purpose of re-litigating claims already decided against them or raise no reasonable inference that § 2255 relief should be granted, "the proper course is to determine the motion on the record, without further expenditure of judicial resources." 2000 WL 703014 at *6.

I note that on appeal from his conviction, Stantini also contended that this Court should have held an evidentiary hearing on his claim of ineffective assistance of counsel. The asserted conflict under which his trial counsel (Charles Carnesi), labored by virtue of his representation of a different defendant, in a different case, in a different district and the relationship between Carnesi, Stantini and Alan Futerfas,

another lawyer in those events, was discussed at some length by the Court of Appeals. Each and every argument advanced by Stantini in support of his claim that Carnesi was conflicted and therefore ineffective was carefully analyzed by that Court. Those arguments, succinctly stated, were: (1) that the court failed its obligation to inquire into facts and circumstances of a possible conflict of interest; (2) that Carnesi's dual representation resulted in an actual conflict which, in turn, resulted in providing ineffective assistance in plea negotiations and defense strategy; (3) that the court erroneously rejected those claims without the benefit of an evidentiary hearing. In rejecting his arguments, the Court held that Stantini showed no lapse in representation, that although pleading guilty was a defense strategy that was not pursued, Stantini offered no evidence that the strategy was not pursued because he did not want to plead.[1] Stantini offered no evidence that the plea strategy was not pursued because Carnesi was conflicted or that he was even the least bit interested in pleading guilty. Stantini's arguments that defense strategies were forgone was not persuasive, said the Court, because "to a large extent Carnesi actually pursued the defense strategy that Stantini argued Carnesi ignored because of his loyalty to Mannino. . . . Stantini's claim is, at bottom that his interests and Carnesi's (and by extension Mannino's) diverged with respect to any concession of Mannino's

1. In this regard it is important to note that "myriad tactical decisions made by defense attorneys throughout the course of their defense implicitly involve the waiver of constitutional rights but do not necessitate the personal consent of the defendant. . . . Thus, when defense counsel 'makes tactical decisions . . . with constitutional implications,' the defendant's consent is not mandated." *United States v. Joshi*, 896 F.2d 1303, 1307 (11th Cir.1990) (internal citations omitted.)

participation in the murder, and that Carnesi declined to make such a concession at trial because of his conflicting loyalty to Mannino. We disagree on both counts. . . . Neither Stantini nor Carnesi has alleged any facts regarding the selection of defense strategy at trial. There is no persuasive indication in the record before us that the refusal to concede the guilt of Mannino was necessitated by anything other than a determination as to the best possible defense to put on." Based upon that analysis of the record in the light of Stantini's claims, the Court concluded that "On the basis of the record before it, the district court did not abuse its discretion in refusing to grant an evidentiary hearing." 85 F.3d at 17-19. As regards what can only be charitably described as Bisaccia's tag along ineffective assistance claim, the Court held that "Because Bisaccia has failed to raise a plausible ineffectiveness claim, there is no need for further factual development in the district court." 85 F.3d at 20.

The citation of cases which discuss the black letter principles regarding the conflict of interest are all too familiar to be repeated. Those principles are almost always the rungs leading to an ineffective assistance claim and their application is dictated by the fact intensive context in which they are sought to be invoked. Such an application has been repeatedly made here and repeatedly decided against them. The discussion of cases cited by the applicants are not helpful in a determination to be made in this case, namely, whether the application for a COA should be granted. Given the record which has already been amassed and discussed in its various litigated reincarnations, it is this Court's view that they have not made a substantial showing that they have been denied a right which is constitutionally theirs.

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3. *Ineffective Assistance of Trial Counsel*

Carnesi

The claimed ineffective assistance of Carnesi was presented and rejected in 1995 WL 228397 (E.D.N.Y.1995) and that rejection was affirmed by the Court of Appeals in an in depth discussion in 85 F.3d 9 (2d Cir.1996). Surely, Stantini is foreclosed from obtaining a COA as to the ineffective assistance of Carnesi claims that were decided there.

4. *Ineffective Assistance of Appellate Counsel*

Futerfas

Futerfas represented Stantini before the Court of Appeals in 1996. Stantini claims that the rejection by that Court of his assertion of Carnesi's ineffectiveness was attributable to Futerfas's ineffectiveness in presenting it.

The government contends, at the outset, that in this Court and the Court of Appeals, the claims of ineffective assistance that were litigated on Stantini's behalf by Futerfas, were collateral to what appears to be the sole issue raised on direct appeal, namely, that the jury instruction on conspiracy was erroneous. 85 F.3d at 20-21. From that it follows, the government continues, that since the defendant has no constitutional right to counsel in litigating a collateral claim, he cannot raise an ineffective assistance claim. GM[2] 27-29 citing, among others, *Pennsylvania v. Finley*, 481 U.S. 551, 555-56, 107 S.Ct. 1990,

2. GM refers to Government's Memorandum in Opposition to a COA.

95 L.Ed.2d 539 (1987). *See also United States v. Angelone*, 894 F.2d 1129 (9th Cir.1990) (Petitioner, who has no constitutional right to counsel when mounting collateral attack upon conviction, could not raise ineffective assistance claim on collateral post conviction petition.).

The foregoing aside, Futerfas *did* present the bases for asserting Carnesi's alleged conflict arising out of his representing Mannino in an earlier and related case. His arguments on behalf of Stantini were addressed in 1995 WL 228397 (E.D.N.Y.1995) and led the Court to conclude that "The defendant must establish a conflict that is real, not one that is predicated upon an 'attenuated hypothesis having little consequence to the adequacy of the representation'. . . . Generalities, speculative and conclusory assertions will not do. The mere 'possibility of a conflict is insufficient to impugn a criminal conviction.' To demonstrate a violation of his Sixth Amendment right, Stantini must establish that an actual conflict of interest adversely affected his lawyer's performance . . . , and the mere representation of another defendant in a related case does not constitute actual conflict." 1995 WL 228397 at * 5. The Court also concluded that "the claim that another trial strategy was available to Carnesi is similarly specious .... Stantini has not demonstrated that a plausible alternative defense strategy or tactic of any substance could have been pursued but was not because of Carnesi's other loyalties." 1995 WL 228397 at *6.

Futerfas pursued Stantini's belated discovery of Carnesi's claimed conflict in the Court of Appeals, which affirmed this Court's rejection of it, writing that Stantini's "arguments regarding defense strategy allegedly foregone are not

persuasive. To a large extent Carnesi actually pursued the defense strategy that Stantini argues Carnesi ignored because of his loyalty to Mannino. . . . Stantini's claim is, at bottom, that his interest and Carnesi's (and by extension Mannino's) diverged with respect to any concession of Mannino's participation in the murder, and that Carnesi declined to make such a concession at trial because of his conflicting loyalty to Mannino. We disagree on both counts." 85 F.3d at 18.

The claimed conflict of Futerfas was argued once again, this time on behalf of Stantini by new counsel and once again rejected with the conclusion, after due consideration to essentially the same arguments presented yet again here, that Futerfas's representation of Stantini was not constitutionally defective. 2000 WL 703014 at *11.

Aside from expressing disagreement with the Court's conclusions in terms which can only be described, regrettably, as inappropriately intemperate, Stantini has made no showing of a denial of a constitutional right that, in this Court's view, can be quantified as being substantial.

5. *The Brady/Kyles Claim*

The gravamen of this claim is that the government failed to disclose an "understanding" or a "deal" that the government made with Gravano that he would never have to implicate his former friends by being allowed to avoid testifying against them. After noting that this Court "rejected the issue out of hand, specifically finding 'no conceivable basis' for a *Brady* claim," he concludes by respectfully submitting without more, "that other jurists would view the

issue differently." SA at 20-21. I can add nothing in response to this claim to what I previously wrote in 2000 WL 703014 at *14 except that I find no explanation of why this Court's rejection of his claim was so deficient as to deprive him of a constitutional right. His request for a Certificate of Appealability on this ground is denied.

II. *Rule 60(b) Motion*

The different objectives sought to be achieved by a motion pursuant to Rule 60(b) Fed.R.Civ.P. and by a petition for habeas corpus pursuant to 28 U.S.C. § 2255 has been succinctly stated in *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir.2001) to be that the Rule 60(b) motion relates to the integrity of the federal habeas proceeding and the § 2255 motion relates to the integrity of the criminal trial.

Stantini relies on Rule 60(b)(1) and (6) for the relief he seeks and not specifying the subdivisions upon which he relies, it is assumed that Bisaccia relies upon those as well.

Rule 60(b)(1) provides in substance that relief from an order or judgment may be granted for reasons of mistake, inadvertence, surprise or excusable neglect and under (b)(6) for any other reason justifying relief from the operation of the judgment. The motion pursuant to 60(b)(1) must be made within one year after the order or judgment was entered and pursuant to 60(b)(6) within a reasonable time. The motion was timely made.

The relief sought pursuant to 60(b)(1) is addressed to mistake, inadvertence, surprise or excusable neglect in

connection with the habeas proceeding and not in connection with the trial at which the habeas proceeding is aimed. 252 F.3d at 198-99.

Stantini gives three reasons for his claimed entitlement to relief pursuant to 60(b)(1). Those reasons are: (1) he was only required to give examples of ineffective assistance until a hearing on those issues was afforded; (2) he expected his recusal motion to be decided before the other motions he made so that, in event the recusal motion was denied, he could seek a writ of mandamus before substantiating the ineffective assistance claims and, in addition, while the recusal motion was pending, he could not amend his petition to add new examples of ineffective assistance; and (3) his counsel's family medical emergencies prevented promptly raising the ground upon which this 60(b) motion is based. Those reasons will be addressed

(1) The sufficiency of examples prior to a hearing.

To begin with, no authority to guide the Court is provided for that proposition either by Stantini in support of it, or by the government to negate it. Guidance may be found, however, in the Rules Governing Section 2255 Proceedings for the United States District Court. Rule 8 does not mandate a hearing, rather, a determination is to be made by the judge upon a review of the proceedings whether a hearing is required. A determination was made that a hearing was not required for reasons which were given in this Court's Memorandum and Order reported in 2000 WL 703014 at *5-*6 as follows:

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> Section 2255 petitioners are not entitled to an evidentiary hearing as a mzatter of right, and the record upon which § 2255 motions are decided may be expanded by the addition of affidavits and documentary exhibits as it has been here, without thereby necessitating such a hearing (citation omitted) where, as is also true here, the record conclusively shows that a petitioner seeks discovery and a hearing for the sole purpose of re-litigating claims already decided against him, claims he is procedurally barred from raising, or new claims that raise no reasonable inference that § 2255 relief should be granted, the proper course is to determine the motion on the record without further unnecessary expenditure of judicial resources. Accordingly, petitioner's motion for . . . an evidentiary hearing is denied.

(2) An expectation that the recusal motion would be decided first

Stantini claims that he entertained the expectation that his request for a preliminary determination of his recusal motion would be granted before he would be required to substantiate his ineffective assistance claim. If that motion were denied he would then seek appellate review by way of mandamus, further forestalling a need to amend his petition to provide further examples of ineffective assistance. It was, and remains, this Court's view for reasons discussed at some length, that the recusal motion was without merit as a matter of law, 2000 WL 703014 at *3-*5, a view about which I am entirely confident, reasonable jurists would not disagree.

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Although I have presided over the trial of this case and over post-trial proceedings in 1995, 1997 and 1998, no motion seeking my recusal was made during that period. Although 28 U.S.C. § 144 expressly provides that a recusal motion must be made timely, that requirement does not appear in § 455, but timeliness has been read into that section. *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2d Cir.1987). One of the factors to be considered in determining timeliness was stated in *Apple* to be whether granting the motion would be a waste of judicial resources. 829 F.2d at 334. No allegation has ever been made, nor could it be, that I harbor some personal animus towards either Stantini or Bisaccia. It is well settled that a motion for recusal requires a showing of personal bias which is ordinarily based on extra-judicial conduct and not conduct which arises in a judicial context. The motion, brought pursuant to 28 U.S.C. § 455, is based on a claimed perception of partiality, based, in turn, as near as can be ascertained, upon my adverse determinations of their assorted claims for post-trial relief. The law in this Circuit is consistently and clearly announced to be that adverse rulings by a judge cannot *per se* create the appearance of bias under § 455(a). *In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir.1980) ("A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest."); *Wilkerson v. McCarthy*, 336 U.S. 53, 65, 69 S.Ct. 413, 93 L.Ed. 497 (1949) ("A timid judge, like a biased judge, is intrinsically a lawless judge.") Cases to the same effect can be cited endlessly.

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In its memorandum of law in opposition to this motion, the government asserts that requiring "a recusal motion to be decided first, to permit review via mandamus, would contradict established legal principles." GM 16. It cites in support of that view, 28 U.S.C. § 1291 as reflecting the intention of Congress to limit the jurisdiction of the Court of Appeals to "final decisions of the district courts"; and *United States v. Hollywood Motor Car Company, Inc.*, 458 U.S. 263, 265, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) which decided that "departures from the rule of finality [are permitted only] in a limited number of cases falling within the 'collateral order' exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-57, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)." Such orders must conclusively "determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from final judgment." The government then contends that the defendants are unable to meet that standard and, therefore, would not be "entitled to appellate review by way of the extraordinary writ of mandamus" designed to be used only in extraordinary cases and not as a substitute for appeal.

The cases decided by the Court of Appeals for this circuit take a broader view. The case cited perhaps most frequently for the contrary view is *Rosen v. Sugarman*, 357 F.2d 794 (2d Cir.1966) (Friendly, J.) which held that "in an appropriate case mandamus could issue to order such disqualification" but added that "To be sure, writs in such cases should be used sparingly and only when the facts alleged clearly call for relief, lest mandamus to review refusals of disqualification become a potent weapon for harassment and

delay." 357 F.2d at 796-97. *See also In re United States*, 158 F.3d 26, 30 (1st Cir.1998) ("For both prudential and practical reasons, we must be slow to 'foster piecemeal review and disturb the historic relationship between trial and appellate courts' ... It is only in unusual situations that interlocutory review of a judge's refusal to step aside is available through mandamus."); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326 (2d Cir.1987) ("[I]t is well-settled that the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is 'clear and indisputable.' ") *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 18, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Other than disagreement with this Court's prior rulings, the petitioners have pointed to no extra-judicial conduct which would make their entitlement to relief clear and indisputable. To grant their recusal motion would have been a waste of judicial resources.

(3) Timeliness issue notwithstanding, the Rule 60(b) motion is considered in its entirety.

The Sentencing Issue

Stantini and Bisaccia were convicted of violating 18 U.S.C. § § 1952B(a)(1) and (a)(5). Those statutes have been renumbered without substantive change to 18 U.S.C. § § 1959(a)(1) and (a)(5). The current statutory references will be used hereafter.

§ 1959(a)(1) provides in relevant part as follows:

> (a) Whoever . . . for the purpose of maintaining or increasing position in an enterprise engaged in

racketeering activity, murders . . . any individual in violation of the laws of any State or the United States . . . shall be punished -

(1) for murder, by death or life imprisonment, ...

(5) for attempting or conspiring to commit murder . . . by imprisonment for not more than ten years. . . .

In charging the jury regarding Count Two of the indictment, alleging a violation of § 1959(a)(1), the Court instructed them that the government must prove each of the following elements beyond a reasonable doubt to warrant a finding of guilt:

1. That the defendant had a position in an enterprise which was engaged in racketeering activity;

2. That the defendant murdered Francesco Oliveri;

3. That the defendant acted knowingly and wilfully; and

4. That the defendant's purpose in committing the murder was to maintain or increase his position in the racketeering enterprise.

For the purpose of this motion, the instruction on the second element only, namely, that the defendant murdered Francesco Oliveri, is relevant. At the outset, it is important to note that § 1959 makes punishable the murder of an individual "in violation of the laws of any State or the United States." The only section of Title 18 of the United States

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Code addressing a murder such as is charged here is § 1111. That section provides in relevant part as follows:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by . . . any . . . kind of willful, deliberate . . . and premeditated killing; . . . is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; whoever is guilty of murder in the second degree shall be imprisoned for any term of years or for life.

Although a literal reading of § 1111(a) would suggest that it is the statute that should be applicable to the crime with which the defendants were charged, it was not the statute about which the jury was instructed. The cases addressing the scope of § 1111 are very few but construe it as being applicable only to murders "within the special maritime and territorial jurisdiction of the United States" by virtue of the limitation of subsection (b). In *United States v. Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y.2000), Judge Sand wrote, at p. 204: "Section 1111(a) defines murder in the first and second degrees. Section 1111(b) specifies the penalties for each of these two types of murder, and *limits the reach of Section 1111 to murders committed '[w]ithin the special maritime and territorial jurisdiction of the United States.' 18 U.S.C.*

§ 1111(b)." (emphasis added). Further on, at p. 205, he wrote: "The actual Section 1111, however, includes its own jurisdictional element, viz., 1111(b)—*which limits Section 1111 as a whole to murders committed '[w]ithin the special maritime and territorial jurisdiction of the United States.*' " (emphasis added). *See also United States v. Parker*, 622 F.2d 298, 301 (8th Cir.1980) ("It is essential to . . . the premeditated murder charges in this case that the actions constituting [that] offense took place 'within the special maritime and territorial jurisdiction of the United States' "); *United States v. Wilson*, 565 F.Supp. 1416, 1428-29 (S.D.N.Y.1983) (Weinfeld, J.). Francisco Oliveri was not murdered "within the special maritime and territorial jurisdiction of the United States" and, therefore, § 1111 was not applicable. For that reason and because § 1959(a) explicitly addresses "murders in violation of the laws of any State," it was necessary and entirely appropriate to invoke the Assimilative Crimes Act, 18 U.S.C. § 13. Accordingly, the jury was instructed on § 125.25 of the New York Penal Law which provides in relevant part as follows:

> A person is guilty of murder in the second degree when:
>
> 1. With intent to cause the death of another person, he causes the death of such person. . . .

Murder in the second degree is a Class A-1 felony and New York Penal Law § 70.00(a)(2) provides that a Class A felony is punishable by life imprisonment.

A violation of 18 U.S.C. § 1959(a)(1), of which the defendants were convicted, made punishable by death or life

imprisonment, is similarly classified as a Class A felony in 18 U.S.C. § 3559(a)(1).

New York Penal Law § 125.27, defining murder in the first degree, would not have been applicable to either defendant as a reading of that statute would readily reveal.

Thus, the only statute applicable to the crime of murder with which the defendants were charged and convicted was § 125.25.

The presentence report applied U.S.S.G. § 2E1.3(a)(2) which provides that in determining the base offense level for violent crimes in aid of racketeering activity (of which the defendants were convicted as charged in Count Two of the indictment) "the offense level applicable to the underlying crime or racketeering activity" should be applied. It is crucial to note that the Application Note to that Guideline provides: "If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used."[3] The most analogous federal offense to New York Penal Law § 125.25, the jurisdictional limitation aside, is plainly 18 U.S.C. § 1111, the only federal statute explicitly criminalizing a murder "perpetrated from a premeditated design unlawfully . . . to effect the death of any human being" and defining that as "murder in the first degree."[4]

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3. The Application Note was in effect on November 1, 1987 and has been in effect continuously thereafter. There is thus no *ex post facto* issue.

4. Other statutes criminalizing murder which are not prosecutable under § 1111 but could be were it not for the (Cont'd)

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The underlying crime or racketeering activity being murder, U.S.S.G. § 2A1.1 captioned "First Degree Murder" with a base offense level of 43 was applied. *See United States v. Minicone*, 960 F.2d 1099, 1110-11 (2d Cir.), *cert. denied*, 503 U.S. 950, 112 S.Ct. 1511, 117 L.Ed.2d 648 (1992); *United States v. Diaz*, 176 F.3d 52, 122-23 (2d Cir.), *cert. denied*, 528 U.S. 875, 120 S.Ct. 181, 314, 315, 145 L.Ed.2d 153 (1999).

In a "Motion for Reconsideration" annexed to an Affirmation by Counsel for Stantini, dated May 1, 2000, the Court is asked to consider a Statement of Facts consisting of eleven numbered paragraphs (Schoen Aff. 3-5). After noting that the statutes the defendants were convicted of violating

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(Cont'd)
jurisdictional limitation, make reference to that statute when the punishment to be imposed is "as provided in section 1111." *See, e.g.*, 18 U.S.C. § § 115(b)(3); 351(a); 1751(a). In § § 924(j) and 1512(a)(3)(A) the formulation is slightly different. § 924(j) provides, in relevant part, that "A person who causes the death of a person through the use of a firearm shall (1) if the killing is a murder (as defined in section 1111) be punished by death or life imprisonment. . . ." And § 1512(a)(3)(A) provides in relevant part, "The punishment for an offense under this section is in the case of a murder (as defined in section 1111) the death penalty or imprisonment for life." That Congress intended to punish the intentional murder of another by death or life imprisonment is thus made manifest by the reference to § 1111 in those other statutes.

That intention was also made manifest by U.S.S.G. Appendix A—Statutory Index which makes § 2A1.1. applicable to those offense and for others where death ensues. *See* 18 U.S.C. § § 1992(b), 2118(c)(2), 2245, 2280(a)(H), 2281(a)(F), 2332a(3) and 2332b(c)(1)(A).

were re-numbered from 18 U.S.C. § § 1952B(a)(5) and (a)(1) to 18 U.S.C. § § 1959(1)(5) and (a)(1) without substantive change, he states the following:

> 3) Both statutes 1952B(a)(5) and (a)(1) describe the criminal acts to include . . . or attempts or *conspiracy* so to do. . . . *Id.* The difference being:
>
> (a)(5) is for the [conspiracy] to commit a murder, and
>
> (a)(1) is for the [conspiracy] to attempt to commit a murder. Both, in aid of racketeering enterprises.
>
> * * * * * *
>
> 5) The government's version of this criminal action alleged:
>
> a) The act was committed in [conspiratorial] concert with at least, Robert Bisaccia, John Gotti, Salvatore "The Bull" Gravano, Giovanni Gambino, Lorenzo Mannino, and others (see PSI ¶ 1, p. 3).
>
> * * * * * *
>
> 6) On or around November 26, 1993, this Court instructed the jury that it was to consider the "conspiracy" allegations of the statute towards a finding of guilt towards both charged counts. There was no special verdict slip every introduced to the jury to determine any culpability beyond the instructed conspiracy charge. (1st Degree Murder never even alleged).

His view of § 1959 suggests that it is aimed at a conspiracy only and not at a substantive offense. He is wrong. § 1959(a) plainly aims at both, and subdivisions (1) and (5) provide the punishment for each. Thus:

> (a) Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, *murders*, . . . any individual in violation of the laws of any State or the United States, *or* attempts or conspires so to do, shall be punished -
>
> (1) for murder, by death or life imprisonment, ...
>
> * * * * * *
>
> (5) for attempting or conspiring to commit murder . . . by imprisonment for not more than ten years. . . . (emphasis added).

His view of the government's version of the criminal action as alleging that the "act was committed in [conspiratorial] concert" is a revision of the indictment. Count One is captioned "Conspiracy to Murder—Francesco Oliveri" and then charges the named defendants together with named others "for the purpose of gaining entrance to, maintaining and increasing position in the Gambino Family, an enterprise engaged in racketeering activity, *conspired to* murder Francesco Oliveri (Title 18, United States Code, Sections 1952(B)(a)(5). . . .)" Count Two is captioned "Murder—Francesco Oliveri" and then charges the named defendants together with named others "for the purpose of

gaining entrance to, maintaining and increasing position in the Gambino Family, an enterprise engaged in racketeering activity, *murdered* Francesco Oliveri. Title 18 United States Code, Sections 1952B(a)(1) (1984) 2 and 3551 *et seq.*" (emphasis added). It is late in the day to dispute that a substantive crime and a conspiracy to commit that crime are not the same offense. *See United States v. Felix*, 503 U.S. 378, 389, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992); *United States v. Sessa*, 125 F.3d 68, 71 (2d Cir.1997).

His view of the jury charge as instructing the jury "that it was to consider the 'conspiracy' allegations of the statute towards a finding of guilt towards both charged counts" is wrong. The jury was instructed in part as follows on Count One:

> A conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime charged in Count Two of the indictment. For example, you can find that the defendant you are considering committed the substantive offense charged in Count Two, but that the government did not prove beyond a reasonable doubt the conspiracy charged in Count One. Or, you may find that the defendant you are considering did commit the crime of conspiracy but that the government did not prove beyond a reasonable doubt that he committed the substantive offense. (Tr. at 40-41.)

His assertion "that there was no special verdict slip ever introduced to the jury to determine any culpability beyond

the instructed conspiracy charge" is wrong. In evidence as Court's Exhibit # 2 (see docket sheet entry # 54) is the Verdict Sheet given to the jury when they retired to deliberate and reads as follows:

> How do you find the defendant Robert Bisaccia as to Count One of the indictment?
>
> Guilty ____ Not Guilty ____
>
> How do you find the defendant Robert Bisaccia as to Count Two of the indictment?
>
> Guilty ____ Not Guilty ____
>
> How do you find the defendant Orazio Stantini as to Count One of the indictment?
>
> Guilty ____ Not Guilty ____
>
> How do you find the defendant Orazio Stantini as to Count Two of the indictment?
>
> Guilty ____ Not Guilty ____

In paragraph 8 of the Statement of Facts, he states that "Nowhere in Stantini's PSI report was there any mention as to which Guideline Manual was used for sentence determination. Stantini committed his crime during 1988 and was sentenced in 1995.2" The footnote reads: "A gleaning of the PSI report reveals some undefined Guideline Manual post November 1, 1990 was used since the writer describes

the Count I punishment based on Guideline § 2A1.5(c)(1). This section was first introduced in a amendment # 311 on November 1, 1990. Previously, the conspiracy to commit murder was described under § 2A2.1." In paragraphs 9, 10 and 11, he states in substance that prior to November 1, 1990, U.S.S.G. § 2A1.1 was applied to first degree murder as per 18 U.S.C. § 1111 and therefore, Stantini was sentenced more onerously, in violation of the *ex post facto* clause, an argument never previously presented to the Court and provides further support for his claim of ineffective assistance. The argument is misplaced, based as it is entirely upon the conviction for conspiracy to murder and the guidelines applicable to that offense. The presentence report applied the guidelines correctly and the absence of a specific reference to the guidelines in effect prior to or after 1988 was irrelevant since either version would have produced the same result.

From the date of its inception on November 1, 1987 U.S.S.G. § 1B1.2(a) taught that the court should determine the offense guideline section applicable to the offense and conviction by referring to the Statutory Index to determine the Chapter Two offense guideline. That index indicated that for an offense under § 1959, reference should be made to U.S.S.G. § 2E1.3. That Guideline and the relevant Application Note to it has been set out above. 18 U.S.C. § 1111 is the most analogous offense to be used and § 2A1.1., First Degree Murder, is the guideline to which the Statutory Index directs.

Stantini observes that prior to November 1, 1990, U.S.S.G. § 2A2.1 was captioned "Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit

Murder; Attempted Murder." A reading of that guideline readily reveals no provision for the case where the conspiracy then resulted in murder. Application Note 1, however, makes reference to the fact that the "maximum term of imprisonment authorized by statute for conspiracy to murder is life imprisonment (18 U.S.C. § 1112)." A reading of 18 U.S.C. § 1112 also readily reveals that it would have no application to the murder for which these defendants were convicted and yet, the Statutory Index referenced § 2A2.1 for that offense.

Amendment 311, effective November 1, 1990 was obviously designed to fill the gap. The title of 2A2.1 was amended to read: "Assault with Intent to Commit Murder; Attempted Murder." The existing guideline was amended by deleting it in its entirety and inserted instead in relevant part, was:

(a) Base Offense Level

(1) 25, [instead of the previous 20] if the object of the offense would have constituted first degree murder;

* * * * * *

The commentary to § 2A2.1 captioned "Statutory Provisions" was amended to replace the existing provisions with § § 1113, 116(a) and 1251(c) none of which would have applied to the murder of Francesco Oliveri. The "Application Note" was amended by inserting the following additional note:

2. "First degree murder" as used in subsection (a)(1), means conduct, that if committed within

> the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

U.S.S.G. § 2A1.5 was inserted for greater clarity to cover conspiracy or solicitation to commit murder, the phrase omitted from the caption to § 2A2.1.

The presentence report applies the Guideline as thus amended to Count One arriving at an adjusted offense level of 43 (PSI ¶ 25) but in ¶ 33 indicates that the statutory maximum term of imprisonment is 10 years pursuant to § 1959(a)(5).

Count Two, the substantive crime of murder, however, required the application of the same guideline § 2A1.1(a), an adjusted offense level of 43 (life imprisonment) which was also the maximum term of imprisonment pursuant to § 1959(a)(1).

Stantini, however, was given a two point adjustment for his role in the offense so that his base offense level was reduced to 41 providing for a guideline range of 324 to 405 months given a criminal history category of I, and he was sentenced at the low end of that range to 324 months. A similar two point adjustment was not warranted for Bisaccia and he was sentenced to life imprisonment.

The attack upon the sentence, invoking *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), is also misplaced. It presupposes that the elements of the offense (murder in the first degree) were not presented

to the jury who were instructed to determine whether the defendants committed the crime of second degree murder in violation of N.Y. Penal Law § 125.25 and were then sentenced for first degree murder. *Apprendi* decided that any factor, other than a prior conviction, that increases the statutory maximum sentence must be submitted to the jury. *Apprendi* was not implicated here at all. There was no additional factor to be submitted to the jury. As has already been indicated, second degree murder is a class A-1 felony under N.Y. Penal Law § 125.25(d)(4) and pursuant to N.Y. Penal Law § 70.00(2)(a) a class A felony is punishable by life imprisonment. The crime for which the defendants were convicted, "murder in aid of racketeering," in violation of 18 U.S.C. § 1959(a)(1), is punishable by death or life imprisonment. The statutory maximum sentence was not increased whether viewed through the lens of § § 125.25 or 1959(a)(1) and *Apprendi* is not offended.[5]

The petitioners' claim of ineffective assistance of counsel insofar as that ineffectiveness is based upon their failure to assert the erroneous application of the Guidelines and suffered their clients to be sentenced to excessive terms of imprisonment is meritless. Counsel's assistance does not fall below any objective standard of reasonableness by failing to press a legally indefensible position.

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5. § 1959(a)(1) was amended in 1994 to read as it now does providing for death or life imprisonment. Prior thereto and at the time the murder of Francisco Oliveri was committed, it read: "for murder or kidnapping by imprisonment for any term of years or for life . . . ." In either case, the statutory maximum was not exceeded and *Apprendi* was not implicated.

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For all the foregoing reasons, the petitioners' applications for a certificate of appealability and for relief pursuant to Rule 60, Fed. R. Civ. Proc. are denied. References made in the course of this opinion to Stantini are applicable to Bisaccia who has joined in Stantini's applications and all of whose claims are similarly without merit.

SO ORDERED.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED APRIL 12, 2000

United States District Court, E.D. New York.

No. 97 CV 6683(ILG), 97 CV 3659(ILG).

Robert **BISACCIA**,

Petitioner,

v.

UNITED STATES of America,

Respondent.

Orazio STANTINI,

Petitioner,

v.

UNITED STATES of America,

Respondent.

April 12, 2000.

MEMORANDUM and ORDER

GLASSER, District J.

Before the Court are the motions of Robert Bisaccia and Orazio Stantini to vacate, set aside, or correct their sentences pursuant to 28 U.S.C. § 2255; the motion of Bisaccia for discovery and inspection, in which Stantini joins; and the

joint motion of both Bisaccia and Stantini for my disqualification pursuant to 28 U.S.C. § 455. The petitioners also seek a hearing for the purpose of adducing purportedly new evidence relevant to their § 2255 claims. For the reasons that follow, the request for an evidentiary hearing is denied, and the petitioners' motions are also denied, in their entirety.

PROCEDURAL BACKGROUND

The underlying facts of this case have been recited in an opinion by this Court denying a motion by Stantini, in which Bisaccia joined, styled as a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and to vacate the conviction and sentence pursuant to 28 U.S.C. § 2255, which was affirmed on appeal by the Second Circuit. Familiarity with those decisions is assumed. *See United States v. Bisaccia*, No. 93-CR-479, 1995 WL 228297 (E.D.N.Y. Apr. 12, 1995), *aff'd sub nom. United States v. Stantini*, 85 F.3d 9 (2d Cir.), *cert. denied*, 519 U.S. 1000 (1996).

Subsequently, both petitioners filed motions to vacate their convictions and sentences, which the Court treated as successive motions under 28 U.S.C. § 2244(b)(3) and the principles enunciated in *Liriano v. United States*, 95 F.3d 119 (2d Cir.1996), and accordingly transferred to the Second Circuit pursuant to 28 U.S.C. § 1631. *See Stantini v. United States*, 986 F.Supp. 736 (E.D.N.Y.1997); *Bisaccia v. United States*, No. 97-CV-6683, 1997 WL 803721 (E.D.N.Y. Dec. 1, 1997). In turn the Second Circuit, finding that this Court had erred in deeming the motions below to be successive, transferred the Stantini case back to this Court for determination as an initial motion made pursuant to 28 U.S.C.

§ 2255. *See Stantini v. United States*, 140 F.3d 424 (2d Cir.1998). Upon transfer, that case was consolidated with Bisaccia's as another initial § 2255 motion.

In December, 1998 Bisaccia moved to disqualify me from further proceedings on his § 2255 motion. Stantini has since joined in that motion. In addition, Bisaccia has moved pursuant to Rule 6 of the Rules Governing § 2255 Proceedings for leave to seek discovery of various documents and exhibits that, he argues, are necessary for and relevant to the adjudication of the claims for relief made in his petition. Stantini has also joined in that motion.

DISCUSSION

I. *The Petitioners' Motion to Disqualify*

The petitioners adduce several grounds purportedly mandating that this Court be disqualified from further proceedings in this matter[1]:

1. The petitioners' recusal motion gives every appearance of being untimely. The law of this Circuit requires such motions to be made "at the earliest opportunity" after information relating to possible bias is obtained. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir.1991). The petitioners were in a position to advance all but the last of their grounds for recusal at the time their petitions were initially filed in 1997, yet they tarried for more than a year. (Indeed, the Court was made privy to some of the soul-searching to which Stantini's counsel was moved in considering whether to bring the motion. (*See* Letters from David Schoen of June 19, 1998 and July 13, 1998.)) Nevertheless, the Court will address the merits of petitioners' claims in order to demonstrate, even more conclusively than the law strictly requires, that both justice and its appearance will be honored in the adjudication of the motions within.

(i) because, well before petitioners' trial, I issued an order of disbarment against Bisaccia's trial counsel, Joel Winograd, I am in a position to give direct testimony material to Bisaccia's claim of ineffective assistance of trial counsel (BM 1-2[2]);

(ii) because, due to ineffective assistance of appellate counsel, the Second Circuit erred in finding that I could not reasonably have known of the possibility of Carnesi's conflict of interest until the testimony of Agent Petrouskie, that issue is now again before this Court, and my state of mind at the time of petitioners' trial is now a material issue (SBM 2-3);

(iii) I was "privy" to a plea agreement with cooperating witness Salvatore Gravano, and to "events occurring in other cases before the Court and outside the confines of a specific case in connection with Gravano's decision to 'cooperate,' " which were withheld or concealed from the defendants (BM 3; SM 6);

(iv) I was also "aware of some . . . criminal activity" by Gravano that the Government failed to disclose to defendants in violation once again of their rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny (BM 3);

(v) it "appears," notwithstanding the conclusions to the contrary of the Second Circuit, that I was "well-informed

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2. "BM" refers to Bisaccia's *pro se* Memorandum of Law in Support of Motion for Recusal; "SBM" refers to the Memorandum of Law in Support of Bisaccia's Motion for Recusal prepared by Robin Kay Lord, Esq.; "SM" refers to Stantini's Memorandum of Law in Support of the Motion for Disqualification.

about the *Mannino* trial prior to [Bissacia]'s trial and knew that [Stantini's trial counsel Charles] Carnesi represented Mannino in that trial" (BM 4);

(vi) this Court reached conclusions about Carnesi's conflict of interest that are so "predetermined" as to render it incapable of reconsideration in light of new evidence submitted by Bisaccia (SM 3);

(vii) this Court's "comments about Gravano and comments and implications about his credibility at his sentencing and perhaps elsewhere ... give rise ... to the appearance of a lack of impartiality on the question of Gravano and his credibility" (SM 4);

(viii) because this Court initially determined that the petitioners' motions herein were successive, which determination the Second Circuit subsequently found to be error, the "appearance of justice" can only be maintained if the motions are determined by a different trial court (BM 8-9).

The seventh claim, concerning this Court's purported bias regarding Gravano, has been thoroughly discussed, and rejected, in an opinion the petitioners saw fit to cite only in passing. There is no need to belabor the points made there, beyond to incorporate them here by reference. *See Garofalo v. Gravano*, 23 F.Supp.2d 279 (E.D.N.Y.1998). The eighth claim may similarly be disposed of in summary fashion by the observation that if § 455 really did require recusal on the occasion of every reversal and remand or transfer back by a Court of Appeals, the result would be district court dockets

thrown into chaos. More to the point, such a requirement would be difficult to reconcile with the provision of § 2255 that motions thereunder be brought in the sentencing court. *United States v. Hayman*, 342 U.S. 205, 212-13 (1952) (surveying the legislative history of § 2255, and noting that the reasons underlying the requirement that motions be made in the sentencing court included the sentencing court's ready access to, and familiarity with, the record of the case).

Petitioners' sixth claim simply states that because this Court has reached conclusions bearing on some of the issues raised here, it is incapable of revisiting those issues in a disinterested manner. But, it is settled in the jurisprudence of § 455 that "[t]he mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir.1976). It is equally true that the mere fact of prior rulings in the proceeding, solely because they were adverse, is insufficient to satisfy the criteria for disqualification under § 455. *See Liteky v. United States*, 510 U.S. 540, 554 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion[, because i]n and of themselves . . . they cannot possibly show reliance upon an extrajudicial source").

The remaining claims present variations on the contention that I am a material witness in these § 2255 proceedings, and must therefore disqualify myself pursuant to 28 U.S.C. § 455(b)(5)(iv). That provision states that a judge

> shall also disqualify himself [when] he . . . [i]s to the judge's knowledge likely to be a material witness in the proceeding.

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The law is clear that the knowledge at issue under § 455(b) must derive from an extrajudicial source. The mere act of participating in and presiding over judicial proceedings does not trigger the mechanisms of disqualification. *See In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1314 (2d Cir.1988) ("[u]nder § 455(b)(1) what a judge learns or comes to believe in his judicial capacity is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification") (citation omitted); *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C.Cir.1992) (district court "did not need to recuse itself under § 455(b)(1), because only personal knowledge of disputed evidentiary facts gained in an extrajudicial capacity is grounds for recusal, and any knowledge [the district judge] had concerning the government's sentencing submissions came directly from his participation in the case").

I turn to petitioners' specific claims in the order in which they are enumerated above. Petitioners claim first that my awareness of Joel Winograd's previous disbarment and reinstatement triggered an obligation to inquire further concerning his potential conflict of interest in representing Bisaccia. Petitioners also speculate that I was aware of other facts concerning then-pending criminal investigations in which Winograd was a target. Petitioners' speculation patently does not provide a basis for a finding of my partiality. A motion for recusal must be supported by facts, "provid[ing] what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *In re United States*, 666 F.2d 690, 695 (1st Cir.1981).

The fact here adduced is that I was aware of Winograd's prior suspension from practice in an unrelated disciplinary proceeding. The question is whether this fact, standing alone, entailed an obligation to inquire about Winograd's conflict of interest. *See United States v. Stantini*, 85 F.3d 9, 13 (2d Cir.1996) ("[t]he trial court has an obligation to inquire into the facts and circumstances of an attorney's interests either in response to a timely conflict of interest objection, . . . or when it knows or reasonably should know of the possibility of a conflict of interest"). It is plain, just by the posing of the question, that it did not. There was no objective reason then, and none is advanced now, even to suppose that the simple fact of Winograd's prior suspension, in a matter completely unrelated to the prosecution of Bisaccia, involved Winograd in a conflict of interest in representing Bisaccia. It follows that an informed observer, knowing that the Court's knowledge of the matter did not trigger a duty of inquiry, would not be moved to conclude that the Court might be biased in assessing Bisaccia's claims here. *See Liteky*, 510 U.S. at 548 (the recusal determination under § 455(a) is to be made "on all *objective* bases, so that what matters is not the reality of bias or prejudice, but its appearance") (emphasis in the original). Moreover, because the issue is in no way relevant to the disposition of those claims, it is difficult to see how any question is raised under § 455(b).

Petitioners' second claim is an attempt to revive an argument already rejected by this Court in the disposition of their Rule 33 motions, subsequently affirmed by the Second Circuit.[3] Bisaccia

3. For this reason, petitioners are barred from obtaining relief in the nature of *habeas corpus* upon it. *See Douglas v. United States*, 13 F.3d 43, 46 (2d Cir.1993) ("a movant cannot raise as a basis for (Cont'd)

now claims that my purported duty to inquire about Carnesi's conflict of interest due to his representation of both Stantini and Mannino was triggered even earlier than Agent Petrouskie's testimony, in the course of the government's re-direct examination of Gravano, by Gravano's confirmation that the Oliveri murder was a charged count in a pending Southern District prosecution against Mannino. (Bisaccia Mem. of Law in Support of § 2255 Mot. at 5-7.) But even if I had the kind of pinpoint recollection of collateral detail with which petitioners insist I should be credited, if only constructively, it would still not affect the Second Circuit's determination that I received no indication from any party that Carnesi was representing Mannino in the Southern District prosecution until the motions for a new trial. *See United States v. Stantini*, 85 F.3d at 14. As the Second Circuit correctly observed, the "only issues raised by Carnesi during trial were the mention of his presence at the meeting [in the Southern District U.S. Attorney's Office, with Jerry Farrell, a witness to the scene of the Oliveri murder] and his possible inability to cross-examine Agent Petrouskie about what had transpired." *Id.* Even if it be assumed that I was also aware, or should have been, that the Oliveri murder was a charged count of the Southern District proceeding, I still had no reason to believe that Carnesi was counsel of record to both Stantini and Mannino. In any event, even conceding that I did or should have had such reason, petitioners say nothing to impugn the Court's additional observation that

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(Cont'd)
vacating her sentence a ground raised in a previous § 2255 motion that was decided on the merits"). Because the claim bears directly on claims raised in the underlying § 2255 motions, however, the merits are briefly aired.

"it was not reasonably apparent how [knowing that Carnesi was representing both Stantini and Mannino] would indicate any obvious divergence of interest with respect to defense strategies, much less the diametrically opposed positions that the attorney had to take in *Ciak v. United States*, 59 F.3d 296 (2d Cir.1995)." *Id.* at 15 (citation edited). It follows that no new issue is raised with respect to which I would be a material witness in these proceedings, and thus, recusal is not mandated under § 455(b).

Petitioners claim that I was privy to a plea agreement between the government and Gravano, which, they allege, contained a provision assuring Gravano that "he would not likely have to testify against any of his crew," and also privy to the government's illegal suppression of that provision. (BM 2-3.) Once again, petitioners rely solely on speculation, this time spun from a passage of a book about Gravano that, even if credited, offers no factual basis for their claim. (This matter is addressed at greater length in Section III.A.3, below.) Once again then, petitioners' attempt to establish a factual predicate for recusal fails. *See In re United States*, 666 F.2d at 694 ("[A] judge . . . should not recuse himself on an unsupported, irrational, or highly tenuous speculation; were he . . . to do so, the price of maintaining purity of appearance would be the power of litigants . . . to exercise a negative power over the assignment of judges.").

Petitioners also claim that my familiarity with other cases related to theirs in which Gravano also testified or cooperated somehow constitutes knowledge from an "extrajudicial source," implicating § 455. But the cases have declined so narrowly to circumscribe the concept of an "extrajudicial

source," for the perfectly sensible reason that, under such a concept, a judge would have to recuse himself from any case "related" to one he had presided over before. *See United States v. Parker*, 742 F.2d 127, 128 (4th Cir.), *cert. denied*, 469 U.S. 1076 (1984) (familiarity with facts stemming entirely from judicial conduct in presiding over earlier proceedings provides no basis for recusal); *United States v. Kasman*, No. CR-93-339, 1993 WL 278440 at *4-6 (E.D.N.Y. July 20, 1993) (ILG) (discussing interplay between related-case and recusal doctrines).

Finally, petitioners offer suspicions that I knew of certain other, unspecified criminal acts by Gravano, but again, such suspicions must fail to raise an issue under § 455. Were it otherwise, "a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest factual bases for bias." *In re United States*, 666 F.2d at 695.

For the reasons set forth, the petitioners' motion for recusal pursuant to 28 U.S.C. § 455 is denied.

II. *The Petitioners' Motions for Discovery and for an Evidentiary Hearing*

Petitioners move for discovery under Rule 6(a) of the Rules Governing Section 2255 Proceedings, and for an evidentiary hearing on their claims. Rule 6(a) permits discovery "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." The Supreme Court has

characterized Rule 6(a)'s "good cause" standard in terms that require a prior assessment of the petitioner's allegations:

> 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry.'

Bracy v. Gramley, 520 U.S. 899, 908 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)). Thus the question for this Court is whether the petitioners' allegations reasonably permit inferences that, if credited, would entitle one or the other of them to relief under § 2255. If the answer is yes, then they should be afforded discovery for the purpose of further drawing out those allegations.

In fact, the answer is no: as will be more fully developed below, this Court concludes that the petitioners have done little more in their voluminous submissions on these motions than offer speculative variations on the ineffective assistance claims already specifically addressed and rejected by both this Court and the Court of Appeals. Even on the assumption that none of their claims is procedurally defaulted, and that all must be evaluated on the merits, the claims simply fail to raise any inference suggesting that § 2255 relief is indicated. Stantini's papers dwell on two new themes: that the proceedings in which Futerfas represented Stantini on a Rule 33 attack must be considered a nullity because of an alleged

conflict of interest deriving from Futerfas's representations before Judge Leisure in the *Mannino* trial on behalf of Carnesi; and that Carnesi was so preoccupied with fear of a government investigation that had ended well before the *Mannino* trial, and so divided in his loyalty to Stantini by the fact of certain prior representations and associations, that he was incapable of rendering effective assistance to Stantini. Stantini also revives and expatiates anew upon claims already advanced in the Rule 33 proceedings that he was denied an opportunity to plead guilty due to ineffective assistance by Carnesi, that the government committed *Brady* violations that require reversal, and that Carnesi's divided loyalty resulted in strategic choices that fatally prejudiced Stantini at trial.

For his part, Bisaccia is mostly content simply to recycle claims of his trial counsel's ineffectiveness already rejected by the Second Circuit. Bisaccia's claims particularly focus on the allegedly prejudicial effect of Winograd's prior disciplinary and criminal record, but, for reasons already in the public record of his case, fail to raise a colorable case for relief under § 2255. To the extent that he raises new claims, and assuming once again that he is not procedurally barred from doing so, those claims are also infirm (taking the form primarily of allegations of *Brady* violations raising no reasonable inference of a constitutional violation meriting § 2255 relief).

Section 2255 petitioners are not entitled to an evidentiary hearing as a matter of right, and the record upon which § 2255 motions are decided may be expanded by the addition of affidavits and documentary exhibits as it has been here,

without thereby necessitating such a hearing.[4] *See Blackledge v. Allison*, 431 U.S. 63, 81 (1977) (a "district judge . . . may employ a variety of measures in an effort to avoid the need for an evidentiary hearing"); *United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir.1988) (noting that "courts may use discovery or documentary evidence to expand the record . . . [as well as] . . . their own notes and recollections . . . [and their] common sense"). Where, as is also true here, the record conclusively shows that a petitioner seeks discovery and a hearing for the sole purpose of re-litigating claims already decided against him, claims he is procedurally barred from raising, or new claims that raise no reasonable inference that § 2255 relief should be granted, the proper course is to determine the motion on the record, without further unnecessary expenditure of judicial resources. Accordingly, petitioners' motion for discovery and for an evidentiary hearing is denied.

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4. 28 U.S.C. § 2255 provides: "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

Appendix C

III. *The Petitioners' Substantive Claims Under 28 U.S.C. § 2255*[5]

A. *Stantini's Claims*

Stantini's primary claims are two-fold: that, because of various conflicts of interest that were concealed from him, the assistance he received from both Carnesi as his trial counsel, and Futerfas as his counsel on the Rule 33 motion and its appeal, was constitutionally ineffective; and that the government concealed or failed to disclose evidence material to his defense at trial, in violation of his rights and the government's obligations under *Brady v. Maryland* and its progeny.

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5. For the most part the claims of Stantini and Bisaccia are considered on their merits, without discussion of the government's claims of procedural default. The justification for this approach is two-fold. First, both petitioners rely substantially on claims of ineffective assistance of counsel. It is true that *Billy-Eko v. United States*, 8 F.3d 111, 114-16 (2d Cir.1993) carved out a narrow limitation to the general rule that claims of ineffective assistance should not be subject to a procedural bar when brought in the first instance in § 2255 proceedings, and it is true too that some of petitioners' claims arguably fall within the scope of that limitation. (Indeed, at least one of them unquestionably does, and is dealt with accordingly. *See* section III.2.a, *infra*.) But the procedural default issues here are sufficiently close that it is appropriate to address the merits. The second reason for caution in the assessment of the government's claims of procedural default has to do with the petitioners' claims of ineffective assistance of appellate counsel. These claims are obviously not barred on procedural grounds. But once assessed in argument on the merits, the Court is led logically to the merits of other new claims that have been adduced in connection with them (as will become more apparent in the discussion that follows).

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These two broadly stated claims disperse into a host of more specific allegations across the expanse of Stantini's papers:

> (i) Carnesi was represented before Judge Leisure in proceedings bearing on his ability to provide conflict-free representation to Mannino by Futerfas, Stantini's counsel on the Rule 33 motion and appeal. Notwithstanding that Carnesi was ultimately reinstated as Mannino's counsel, Futerfas's ability to provide effective assistance to Stantini on his claim that Carnesi had provided ineffective assistance at his own trial was fatally compromised by his continuing duty of loyalty to Carnesi. (Stantini Reply Mem. at 8-11, 29-30; Stantini Supp. Reply Mem. at 15-18.)
>
> (ii) Futerfas also "actively represented" Mannino in the Southern District trial before Judge Leisure, during the period of Carnesi's temporary disqualification from that case, again rendering him incapable later of providing effective assistance to Stantini. (Stantini Reply Mem. at 11-13, 29- 30; Stantini Supp. Reply Mem. at 19-21.)
>
> (iii) Because of his divided loyalties to Manino, Carnesi "did all that he could to avoid having Stantini enter into a" plea agreement that the government had made available, thus rendering constitutionally ineffective assistance to Stantini. (Stantini Reply Mem. at 19.)

(iv) Because he had been the target of a criminal investigation, Carnesi was deliberately less than zealous in his representation of Stantini, in an effort to "curry favor" with the government. (*Id.* at 24-25.)

(v) Because of divided loyalty to Erasmo Gambino, who was implicated in the crime, Carnesi declined an opportunity to impeach Gravano with evidence (turned over to the defense by the government in the *Mannino* trial) of his participation in a murder with which he was never charged by the government. (*Id.* at 25-28.)

(vi) The government suppressed a secret agreement with Gravano that he "could choose not to testify against his crew," in an action that constitutes "a reversible *Brady* violation." (*Id.* at 31, 34-36.)

(vii) This Court committed reversible error in failing to make a timely inquiry into Carnesi's potential conflict of interest, a matter that should be revisited despite the Court of Appeals' express rejection of the argument because Futerfas's failure to raise it initially on the Rule 33 motion was due to his ineffective assistance. (*Id.* at 39-43.)

These claims are addressed in the order raised.

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1. *Futerfas's alleged conflicts*

Stantini argues that Futerfas was so debilitated by conflicting loyalties, which so adversely affected his representation of Stantini on the Rule 33 motion and its appeal, that those proceedings should be considered a "nullity," and Stantini should, at a minimum, be returned to the position he occupied immediately post-verdict, and allowed to take a direct appeal. Stantini's counsel pursues this argument quite zealously in his papers, raining scorn both on the government's opposition, and on anyone else inclined to a view of the issues different from his own. Counsel's often intemperate tone is unfortunate, because in this instance his arguments fail to persuade, for reasons manifest under the law concerning conflicts of interest.

The Second Circuit set forth the controlling legal principles in its decision affirming denial of the Rule 33 motion:

> A claim that counsel is conflicted is in essence a claim of ineffective assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 70 (1942). Generally, a defendant who claims ineffective assistance must show prejudice to prevail. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, when counsel is burdened with an actual, as opposed to a potential, conflict of interest, a "fairly rigid" presumption of prejudice applies. *Id.* at 692. Nevertheless, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests'

> and that 'an actual conflict of interest adversely affected his lawyer's performance." ' *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)). "In the multiple representation context, an attorney has an actual, as opposed to a potential, conflict of interest when 'during the course of the representation, the defendants' interests . . . diverge with respect to a material factual or legal issue or to a course of action." ' *United States v. Fulton*, 5 F.3d 605, 609 (2d Cir.1993) (quoting *Cuyler*, 446 U.S. at 356 n. 3). Once a defendant has established that there is an actual conflict, he must show that " 'a lapse of representation' . . . resulted from the conflict." *United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir.1986) (quoting *Cuyler*, 446 U.S. at 349). To prove a lapse of representation, a defendant must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued" but was not and that "the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir.1993) (quoting and adopting the test of *United States v. Gambino*, 864 F.2d 1064, 1071 (3d Cir.1988), *cert. denied*, 492 U.S. 906 (1989)), *cert. denied*, 511 U.S. 1022 (1994).

United States v. Stantini, 85 F.3d at 15-16 (citations edited). On the record of this case, Stantini cannot show either that Futerfas's loyalty to him was compromised, or, even assuming it had been, that Stantini's interests in the Rule 33 proceedings were adversely affected.

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(a) *The Alleged Conflict with Carnesi*

It is apparent in the first place that Futerfas's prior "representation" of Carnesi was hardly what the "multiple representation" cases are concerned with. According to Futerfas, after learning that he was no longer the target of a criminal investigation, Carnesi sought his "counsel" in seeking reinstatement as Mannino's counsel of record. (Futerfas Aff. at ¶ 4, Stantini's Corrected Reply Exh. 3.) Futerfas accordingly wrote a letter to Judge Leisure "on behalf of Mr. Carnesi that ultimately led to his reinstatement back into the case as trial counsel for Mr. Mannino." (*Id.*)

These activities fall far short of the constitutional benchmark for actual conflict of interest. In *Glasser v. United States*, for example, defense counsel refrained from cross-examining a prosecution witness whose testimony directly linked the defendant to the crime, and failed to object to the introduction of arguably inadmissible evidence. Both actions were plausibly traced to counsel's "desire to diminish the jury's perception" of the guilt of a co-defendant whom counsel was also representing. *Cuyler*, 446 U.S. at 349. The Supreme Court found that, as a result, Glasser had been denied his right to effective representation of counsel. *Glasser*, 315 U.S. at 76.

By contrast, the Second Circuit found no actual conflict in *United States v. Lovano*, 420 F.2d 769 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970). There, counsel had represented two defendants in the same trial, one who claimed entrapment, and another who denied the existence of the

charged conspiracy. *Lovano*, 420 F.2d at 774. The Court declined to find an actual conflict of interest on the ground that the two defendants were alleged to have been involved "in completely different aspects of the conspiracy." *Id.*

Lovano makes clear that a defendant claiming ineffective assistance due to a conflict of interest must do more than "show only that counsel had faced a situation in which action or inaction that *might* benefit his client would work to the detriment of another interest that divided counsel's loyalty." Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 11.9 at 579-80 (2d ed.1992) (emphasis supplied). *See Lovano*, 420 F.2d at 774 (rejecting as "mere speculation" defendants' contention on appeal that counsel had declined at trial to elicit testimony from a co-defendant who had already pleaded, on the ground the testimony "might, while assisting one of [the two defendants on trial], have had an adverse effect upon the other, or, though assisting both, might have had an adverse effect [on the co-defendant who had pleaded]"). Yet, for all the storm and stress of his rhetoric, Stantini has, at most, shown no more than that. That is, he has shown that in representing Stantini on his claim of Carnesi's ineffectiveness, Futerfas could conceivably have felt a conflicting loyalty to Carnesi. This conflicting loyalty in turn rests on the slender thread of a letter on Carnesi's behalf, supporting his reinstatement as counsel of record in the *Mannino* trial. This showing falls well short of making even a *prima facie* case for Futerfas's "actual conflict."

In fact, even if it be assumed solely for the purpose of argument that Futerfas had an actual conflict of interest, Stantini cannot show an adverse effect on Futerfas's

performance. Counsel for Stantini suggests derisively that Futerfas was merely "going through the motions" in the Rule 33 proceedings. (Stantini Supp. Reply Mem. at 17.) But the findings of the Second Circuit in *United States v. Stantini*, 85 F.3d 9 (2d Cir.1996) are to the contrary. Futerfas vigorously pressed the argument that Carnesi's concurrent representation of Mannino resulted in an actual conflict, and also argued that this Court should have been aware of Carnesi's conflict, and failed to inquire into it. Those arguments were rejected, for reasons that need not be rehearsed once more here, but certainly the fact that they were cannot be attributed to Futerfas's deficient performance as Stantini's counsel. Indeed, Stantini's assertions are not to the contrary: for example, he accuses Futerfas of failing to secure a more damning affidavit from Carnesi, but that "failure" is Carnesi's and stems, according to the averments of Stantini's counsel, from the fact that Carnesi "continues to put himself first." (Stantini Reply Mem. at 20.)

(b) *The Alleged Mannino Conflict*

Stantini also insists, no more plausibly, that Futerfas had an actual conflict due to his prior representation of Mannino, which resulted in ineffective assistance to Stantini due to its adverse effects on Futerfas's performance in the Rule 33 proceedings. Again, however, even assuming that Stantini can establish an actual conflict, he can point to nothing in Futerfas's performance rising to the level of a lapse in representation and deriving from his conflicting loyalty to Mannino.[6] Stantini cites

6. In fact, there is no showing in the record that Futerfas at any time "actively represent[ed] conflicting interests" in acting on behalf of Mannino and Stantini. *Cuyler*, 446 U.S. at 350. Stantini speculates

(Cont'd)

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Futerfas's failure to argue that Carnesi's temporary disqualification in *Mannino* raised a *Cancilla*-type conflict, but it is difficult to see what such a strategy could have availed Stantini in the absence of any suggestion that Carnesi's defense of Stantini could have "uncover[ed] evidence or prompt[ed] testimony revealing his own crimes." *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir.1984). Here, Carnesi was not exposed to prosecution, and knew that he would not be before the beginning of Stantini's trial. Thus, there is no analogy to defense counsel's circumstances in *Cancilla*, where the government's investigation commenced only *after* the defendant had been convicted, and where the Court of Appeals assumed for the purpose of the appeal that counsel had in fact engaged in criminal activity directly related to the defendant's charged conduct. *Id.* at 868.

Stantini also claims that Futerfas failed to press the conflict argument that he did raise with sufficient zeal, and he raises anew the claim that the Court committed reversible error in failing to obtain a *Curcio* waiver from Stantini at trial (this time in the guise of an argument that Futerfas was ineffective in failing to raise the *Curcio* point until the appeal of the Rule 33 motion). These contentions again fail to raise an inference of a lapse of representation in the Rule 33

(Cont'd)
that "[h]ad Futerfas been in a position to pursue Mannino's role and reveal what Mannino knew . . . he would have put on truthful evidence that Mannino had a key role in the Oliveri murder . . . and that Mr. Stantini was not at all involved. . . ." (Stantini Supp. Reply Mem. at 20.) This is precisely the sort of speculation about possibilities untethered to facts that cannot sustain a showing of actual conflict. *Lovano*, 420 F.2d at 774.

proceedings—the former for reasons already discussed above, and the latter for reasons more fully set forth below.

For the reasons stated, this Court concludes that Futerfas's representation of Stantini in the Rule 33 proceedings was not constitutionally ineffective, and thus, provides no basis for relief pursuant to 28 U.S.C. § 2255.

2. *Carnesi's Alleged Conflicts*

Stantini's allegations of Carnesi's ineffectiveness due to conflict of interest are three-fold: first, Stantini attempts to revive his claim, decided against him already by the Second Circuit, that Carnesi prevented him from entering into a favorable plea agreement, because of his loyalty to Mannino; second, Carnesi, like Futerfas, represented Stantini under circumstances that mandate reversal under the rule of *Cancilla;* finally, Stantini offers a new claim of Carnesi's divided loyalty, based on certain Jencks and impeachment material made available by the government in the *Mannino* trial, which Stantini's counsel purports has hitherto been "concealed."

(a) *Stantini's Desire to Plead Guilty*

In his Rule 33 appeal, Stantini argued that Carnesi had failed to "fully represent [his] interests in plea negotiations because of his fears of the effect a Stantini guilty plea would have on Mannino in the Southern District case." *United States v. Stantini*, 85 F.3d at 16. Stantini supported this position with an affidavit from Futerfas, setting forth reasons (presumably upon information and belief) why Carnesi was

"somewhat relieved by Mr. Stantini's initial negative reaction to the plea offer." *Id.* In response to this argument, and to the Futerfas affidavit purporting to sustain it, the Second Circuit wrote:

> The Futerfas affidavit was conspicuously silent in several respects: It offered Judge Glasser no assertion that (1) Carnesi did not make the statement to the government that Stantini was not interested in pleading guilty, (2) Carnesi misrepresented Stantini's position when he informed the government that Stantini was not interested in pleading guilty under any circumstances, (3) Carnesi in any way counseled Stantini inadequately with respect to the advantages or disadvantages of a plea or (4) Stantini was, or could have been, interested in accepting a plea under any set of circumstances. Either Stantini or Carnesi, or both, were in a position to make these assertions if they were true, but they failed to do so. Therefore, putting aside the issue of whether Carnesi labored under an actual conflict of interest, Stantini has not shown any lapse in representation. Although in theory pleading guilty was a plausible defense strategy that was not undertaken, Stantini has offered no evidence whatsoever that this strategy was not undertaken for any reason other than his own desire not to so plead. He has not indicated that there is any evidence that the strategy was forgone because of any conflicting interest of Carnesi.

> This is so regardless of what Carnesi's personal reaction may have been to Stantini's own position.

Id. at 16-17. Stantini now attempts to remedy the deficiencies of his earlier argument, with factual allegations tailored to the Second Circuit's specifications.[7]

Stantini's attempt to revive the allegation that Carnesi impeded his desire to enter into a plea agreement falls afoul of two settled principles of *habeas corpus* litigation. First, "[a] § 2255 motion may not relitigate issues that were raised and considered on direct appeal." *United States v. Perez*, 129 F.3d 255, 260 (2d Cir.1997), *cert. denied*, 525 U.S. 953 (1998). Stantini already raised his claim of Carnesi's ineffective handling of the plea negotiations in his appeal of the Rule 33 motion, which the Second Circuit deemed to be "a direct appeal of Stantini's conviction. . . ." *Stantini v. United States*, 140 F.3d 424, 427 (2d Cir.1998).

"A defendant is also barred from raising claims in his § 2255 motion that he failed to raise on direct appeal unless he shows cause for the omission and prejudice resulting therefrom. . . . A defendant may raise such claims where the issues were not raised at all on direct appeal due to ineffective assistance of counsel." *Perez*, 129 F.3d at 260-61 (citations and internal quotations omitted). Even if Stantini's new allegations are deemed a new claim subject to cause-and-prejudice analysis, they must nevertheless fail, because, for the reasons already set forth, Stantini cannot show that he

7. For example, Stantini now says that "I never told Mr. Carnesi that I would not plead guilty under any circumstances; nor was that ever my position." (Second Stantini Aff. at ¶ 15.)

was accorded ineffective assistance by Futerfas on his Rule 33 appeal.

(b) *Carnesi's Cancilla Conflict*

Stantini's claim that Carnesi suffered from a *Cancilla* conflict fails for reasons already touched on. Stantini's argument is that because Carnesi had been the target of a federal criminal investigation in the Southern District, had been disqualified as Mannino's trial counsel for a period of almost two years in the course of those proceedings, and had been overheard on certain tape recordings used as evidence in that case, he suffered from actual conflicts of interest that adversely affected his performance as Stantini's counsel.

Stantini particularly relies on *United States v. Levy*, 25 F.3d 146 (2d Cir.1994). But that case is unavailing to him, and indeed highlights why his showing falls short of the constitutional threshold for ineffectiveness due to conflict of interest. First, in *Levy* the Court found that the conflicted defense counsel's "colloquies with the District Court revealed that his desire to avoid being called as a witness made him willing to sacrifice or compromise certain trial strategies and defenses." *Levy*, 25 F.3d at 156. By contrast, Stantini is unable to explain how either Carnesi's testimony, or the tapes that had been introduced against Mannino, could have been material evidence going to any issue in Stantini's trial. Second, in *Levy* the conflicted attorney was facing *pending* criminal prosecution by the same office that was prosecuting the defendant. *Id.* Here, the investigation of Carnesi by a different office and with respect to a different prosecution had been terminated before the proceedings against Stantini

had even begun. Likewise, Carnesi had been reinstated by Judge Leisure as counsel of record in *Mannino* before Stantini's trial.

Counsel to Stantini on this motion conjures a litany of alternative defense strategies forgone by Carnesi due to his putative conflicts of interest. But, in the absence of a convincing showing of actual conflict, such speculation cannot carry the burden of establishing ineffectiveness. The Second Circuit has already specifically found that Carnesi's interests and Mannino's did not diverge with respect to Mannino's participation in Oliveri's murder, and also that Carnesi did not refuse to pursue a theory of Mannino's culpability at Stantini's trial due to his conflicting loyalty to Mannino. *United States v. Stantini*, 85 F.3d at 18. On the basis of these findings, the Second Circuit rejected the contention, pressed by Futerfas in the Rule 33 proceedings, that Carnesi deliberately avoided certain defense strategies due to conflicts of interest. There is no reason advanced on this § 2255 motion to disturb that conclusion.

(c) *Carnesi's Divided Loyalty to Erasmo Gambino*

With histrionic flourish quite out of proportion to the substantiality of the claim, Stantini finally advances a new theory of Carnesi's conflict of interest, the lynchpin of which is an FBI report made available to Carnesi as part of the impeachment material in the *Mannino* case. The report sets forth hearsay allegations from an inmate in a federal prison concerning Gravano's alleged involvement in the murder of one Pietro Inzerillo in 1980 or 1981, which was allegedly commissioned by Erasmo Gambino. (*See* Corrected Exhs.

in Support of Stantini Reply Mem., Exh. 8.) Stantini claims that Carnesi declined the opportunity to use this material to impeach Gravano during his testimony against Stantini because Gambino was a "friend/client/associate" who had never been charged in the Inzerillo murder. (Stantini Reply Mem. at 26.)

Notwithstanding the heated insistence to the contrary of Stantini's counsel, it is apparent that, even assuming that Carnesi had Gambino's interests in mind when representing Stantini, the most that was forgone was "an opportunity to cross examine Gravano about [one] more murder[ ]." *United States v. Locasio*, 6 F.3d 924, 949 (2d Cir.1993), *cert. denied*, 511 U.S. 1070 (1994). It is not disputed that Gravano would have denied involvement in the Inzerillo murder, and the evidence to the contrary would likely have been deemed inadmissible. *See* Fed.R.Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence."). Even if the FBI report so impressive to Stantini's counsel had been admitted, and used as a means for impeaching Gravano, it would have had no effect on Gravano's credibility that is discernible to this Court. The report—based entirely on hearsay twice removed from an unidentified source—is unreliable and untrustworthy on its face, but even if it were not, it would certainly have been cumulative. The Second Circuit's observation in rejecting a claim of *Brady* violations based on material that included the same report is apposite:

> Gravano had already confessed to numerous crimes, including murders, and was subject to

> withering cross examination for those actions. The addition of a few more allegations would not have materially affected the defense's cross examination of him.

Id. at 949; *see also United States v. Gotti*, 171 F.R.D. 19, 52 (E.D.N.Y.1997) (" '[N]ew evidence' which is merely cumulative or impeaching is not an adequate basis for the grant of a new trial."). In this instance, Stantini's "new" claim is in fact a very stale claim, no more persuasive now than it was eight years ago when first raised and rejected by both this court and the Second Circuit. *See United States v. Gotti*, No. 90 CR 1051 (E.D.N.Y. Oct. 29, 1992), *aff'd sub nom. United States v. Locasio*, 6 F.3d 924, 948-50 (2d Cir.1993), *cert. denied*, 511 U.S. 1070 (1994). Certainly Carnesi's "failure" to exploit the material at issue falls far short of showing that Carnesi's conduct at Stantini's trial fell below an objective standard of reasonableness, or otherwise prejudiced his defense. *Strickland*, 466 U.S. 687-88. Accordingly, this ground too fails as a predicate for § 2255 relief.

3. *The Government's Alleged Brady Violation*

Pointing to Peter Maas's *Underboss*, published in 1997, Stantini, joined by Bisaccia, claims that it is now clear that Gravano struck a "secret" deal with the government guaranteeing that he would not have to testify against his closest friends and associates in the Gambino organization,

and then concealed that deal from Stantini, in a violation of his rights under *Brady* that mandates reversal.[8]

At the risk of incurring the invective of Stantini's counsel—who ridicules the government's opposition to this claim as "more disingenuous baloney," and as "an attempt to be cute regarding the government's disclosure obligation," (Stantini Reply Mem. at 34)—this Court confesses difficulty in ascertaining the basis for the alleged *Brady* violation. The Maas biography does not refer, even obliquely, to any secret deal struck between Gravano and the government. It purports to describe Gravano's motive in seeking a conditional two-year limitation on his cooperation—that he wished to "avoid, if possible," testifying against certain members of the Gambino organization. Of course such a limitation was incorporated into Gravano's plea agreement, which was approved by this Court, and made available by the government, in its entirety, to Stantini and Bisaccia pursuant to its obligations under *Brady* and its progeny. Stantini's counsel thinks that the Maas biography makes it "clear" that the plea agreement embodied some sort of unarticulated

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8. Stantini evidently has the following passage in mind, describing negotiations between Gravano and government prosecutors that resulted in Gravano's plea agreement: "[Gravano] did achieve two important points. One was a two-year cap on his availability as a government witness. Clearly he wanted to avoid, if possible, testifying against any of the loyal members of his old crew. A 'good faith' compromise was reached. If, through no fault of the government, a case it wished to prosecute had not been brought to trial before the two years were up, Sammy would cooperate. Otherwise, the decision to testify would be solely Sammy's." Peter Maas, *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* 192 (1997).

guarantee to Gravano that he would never have to testify against his "crew." But what is really "clear" is that the Gravano plea agreement simply means what it says: that Gravano would remain available to testify in any case brought by the government within two years of his signing, as well as in any later-tried case that the government had been unable in good faith to bring to trial earlier. The agreement, including that provision, was turned over to Stantini and Bisaccia and was before the jury that convicted them both. There is no conceivable basis for a claim of *Brady* violation deriving from the government's handling of it.

(4) *This Court's Failure to Inquire into Carnesi's Conflicts at Trial*

Finally, Stantini raises again a claim already decided against him twice in the Rule 33 proceedings: that this Court committed reversible error in failing to inquire further concerning Carnesi's conflicts of interest. Stantini argues that in light of his showing of Futerfas's ineffectiveness as appellate counsel, he should be allowed to re-litigate this claim.

This claim has already been addressed above, in Section III.A.1, denying the motion for recusal. The sum of the matter is that Stantini has said nothing and pointed to no evidence mandating reconsideration of the Second Circuit's conclusion that my "failure" to inquire into Carnesi's putative conflicts may be ascribed primarily to the fact that they were not actually brought to my attention, and nothing had transpired in the trial that can reasonably be charged to me as constructive notice. *United States v. Stantini*, 85 F.3d at 14-

15. Taken together with Stantini's failure to show Futerfas's ineffectiveness as counsel on his Rule 33 appeal, the Second Circuit's findings estop Stantini's attempt to re-litigate this issue, under principles of procedural bar already discussed in connection with his attempt to re-litigate his claim regarding the forgone plea agreement. (*See supra* Section III.A.2 .a.)

For the foregoing reasons, Stantini's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied.

B. *Bisaccia's Claims*

Bisaccia seeks to revive his claim that his trial counsel, Joel Winograd provided ineffective assistance on the ground that, like Carnesi, Winograd was subject to *Cancilla*-type conflicts of interest, inasmuch as he had previously been the subject of criminal investigations and proceedings, had been convicted of a felony and had been suspended from practice. Bisaccia also argues ineffective assistance of appellate counsel, pointing to portions of the trial transcript that should have been marshaled in support of his contention that this Court reasonably should have been aware of Carnesi's conflict of interest due to his representation of Mannino. Finally, Bisaccia advances various allegations of the government's *Brady* violations, including two that have already been specifically rejected by this Court, and by the Second Circuit.[9]

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9. By a letter to the Court dated November 24, 1999, Bisaccia's attorney also raises a claim of ineffective assistance of trial counsel based on trial counsel's alleged failure to investigate certain witnesses that he purports are exculpatory.

Appendix C

1. *Ineffective Assistance of Trial Counsel*

In his Rule 33 motion and appeal, Bisaccia argued ineffective assistance of trial counsel on the basis of Winograd's failure to recognize and take action regarding Carnesi's conflict, and his decision to pursue a joint defense strategy with Carnesi. This claim was conclusively answered by the Second Circuit, applying the familiar standards of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984):

> Bisaccia has failed to demonstrate any deficient performance on Winograd's part. There was virtually no reason to think that the dual representation would give rise to a conflict of interest that would in any way affect Bisaccia's case. Under these circumstances, Winograd's failure to move for Carnesi's disqualification or to bring the possible conflict to Judge Glasser's attention was not objectively unreasonable. Moreover, there was no deficiency with respect to Winograd's performance in plea negotiations or at trial. He had no control over the government's demand that both defendants agree to plead guilty or over Stantini's reaction to the plea offer. Moreover, it was not unreasonable to adopt the trial strategy that Winograd did. Winograd attempted to impeach Gravano's credibility by calling attention to his criminal past, his exhortations to associates to lie when testifying under oath, and the benefits that Gravano stood to gain by helping convict other members of the Gambino family. He argued that the corroborating

> evidence against Bisaccia had no relationship to the murder. Most significantly, to the extent that Bisaccia now argues that Winograd adopted a defense strategy that refused to throw light on Mannino's guilt, Winograd brought out on cross-examination of Agent Petrouskie that Farrell had identified Mannino (rather than Bisaccia) as standing over the body at the scene. He also highlighted corroborating evidence against Mannino in his summation. Because Bisaccia has failed to raise a plausible ineffectiveness claim, there is no need for further factual development in the district court.

United States v. Stantini, 85 F.3d at 20. Bisaccia now seeks to revive his claim that Winograd was constitutionally ineffective by reference to disciplinary proceedings, a felony conviction, a history of psychiatric treatment, and criminal investigations that are all part of Winograd's checkered past. Specifically, Bisaccia claims that Winograd's troubled history supports a finding of a *Cancilla*-type conflict of interest.

The Second Circuit, and one district court have specifically addressed all of the contentions concerning Winograd raised once more by Bisaccia on this motion. *See United States v. Aiello*, 900 F.2d 528 (2d Cir.1990); *United States v. Grado*, 1996 WL 626354 (2d Cir. Oct. 20, 1996) (unpublished opinion); *United States v. Aiello*, 1997 WL 630184 (S.D.N.Y. Oct. 9, 1997), *as amended* 1997 WL 716913 (S.D.N.Y. Nov. 12, 1997). As was the case both in *Aiello* and *Grado*, Winograd's alleged offenses were "totally unrelated" to the crimes for which Bisaccia was being tried.

Aiello, 900 F.2d at 531. Likewise, the crimes, investigations, and potential investigations to which Bisaccia refers were, with one exception, entirely concluded by the time of Bisaccia's trial. The one exception involves an investigation that "the government could have initiated" into allegations that Winograd had improperly provided sealed FBI surveillance transcripts to a client around the time of Bisaccia's trial. But, as the Second Circuit observed in an unpublished opinion rejecting this very claim, "the defendant here cannot point to anything more than the possibility that the attorney could be prosecuted"—insufficient on its face to create a conflict that impugns the verdict. *Grado*, 1996 WL 626354 at * *4.

None of the incidents dredged up by Bisaccia shows that Winograd courted any risk of further exposing himself to government investigation or suspicion by conducting a vigorous defense of Bisaccia—which is precisely what the Second Circuit determined he did, in rejecting Bisaccia's contention of his ineffectiveness the first time around. Accordingly, Bisaccia's claim of Winograd's ineffectiveness must again fail.

2. *Ineffective Assistance of Appellate Counsel*

Bisaccia's claim that he was accorded ineffective assistance of appellate counsel is based on the claim that appellate counsel failed to call the Second Circuit's attention to testimony on the record of Bisaccia's trial that would have demonstrated conclusively that this Court committed plain error in failing to obtain a waiver from Bisaccia concerning Carnesi's conflict of interest due to the *Mannino* proceedings.

Appendix C

The underlying claim has already been addressed and disposed of—this Court had no objective reason to believe that Carnesi was counsel of record in *Mannino* until the issue was raised directly in the Rule 33 proceedings after Bisaccia's trial. The issue of whether, even if Carnesi's conflict could be shown, Bisaccia could demonstrate prejudice, was also addressed by the Second Circuit:

> Bisaccia's basic proposition is that if counsel for co-defendant A is burdened with an actual conflict of interest, co-defendant B can take advantage of this and obtain a new trial. However, there is no reason for us to consider the validity of this theory, which Bisaccia's appellate counsel conceded was "somewhat novel." We have determined that Stantini suffered no lapse of representation in plea negotiations from any conflict that Carnesi may have been laboring under, and that there was no divergence of interest between Stantini and Mannino with respect to trial strategy. Under the circumstances, Carnesi's conduct, regardless of any alleged conflict, could not have prejudicially affected Bisaccia.

United States v. Stantini, 85 F.3d at 19. It follows that Bisaccia's appellate counsel was not ineffective for failing to press the theory of Carnesi's putative conflict with sufficient diligence and zeal.

Appendix C

3. *Bisaccia's Brady Claims and a Related Claim of Ineffective Assistance*

Bisaccia, like Stantini, points to evidence of other criminal conduct by Gravano allegedly suppressed by the government in violation of its obligations under *Brady*. This claim fails here for the reasons already set forth above, and at much greater length in a body of case law Bisaccia does not even attempt to grapple with. *See, e.g., United States v. Locasio*, 6 F.3d at 948-50; *United States v. Gotti*, 171 F.R.D. at 48-53; *United States v. Gambino*, 835 F.Supp. 74, 85-96 (E.D.N.Y.1993), *aff'd*, 59 F.3d 353, 363-67 (2d Cir.1995), *cert. denied*, 517 U.S. 1187 (1997).

Bisaccia also raises claims of *Brady* violations stemming from the government's failure to turn over reports of FBI interviews with Annie Gonzalez, Anthony Rodriguez, and Jerry Farrell, alleged material witnesses to the charged offenses, as well as its failure to disclose that Mannino's home had been searched in 1988, and that a gun had been seized pursuant to that search.

Bisaccia does not dispute that co-counsel to Winograd at trial, George Abdy, was aware of both Gonzalez and Farrell as potential witnesses, but declined to call them at trial. Thus, any information concerning what they might have told federal agents falls beyond the scope of *Brady*. *See United States v. Grossman*, 843 F.2d 78, 85 (2d Cir.1988), *cert. denied*, 488 U.S. 1040 (1989) ("... *Brady* does not require the government to turn over exculpatory evidence if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.") (citation and internal quotation omitted).

Nor does Bisaccia dispute that Rodriguez was never interviewed by federal agents. (Rodriguez Aff. at ¶ 12.) Rodriguez was apparently interviewed by detectives from the New York City Police Department, and Bisaccia does not deny having obtained copies of reports reflecting the NYPD interviews. (*Id.* at ¶ ¶ 7-11.) At any rate, Bisaccia's claim of a *Brady* violation relating to this material betrays the sort of "monolithic view of government which, if adopted, would condemn the prosecution of criminal cases to a state of paralysis." *United States v. Gambino*, 835 F.Supp. at 95.

The same must be said of the search of Mannino's home and the alleged seizure of a weapon there. Bisaccia does not allege, and there is not a shred of evidence to suggest, that the government (which is to say, the office of the United States Attorney for the Eastern District of New York) was aware that a weapon had been seized from Mannino's home. But even if it had been, Bisaccia would be unable to show the materiality of such evidence to his claim of a *Brady* violation. The evidence at his trial showed that Mannino and Joseph Gambino had been responsible for securing the weapons to be used in Oliveri's murder, so the seizure in Mannino's home of a weapon that might have been used in the murder hardly tends to exculpate one of his co-conspirators. *See United States v. Stantini*, 85 F.3d at 12.

Bisaccia also claims that his trial counsel was ineffective for failure to investigate Rodriguez, Gonzalez, and Farrell as exculpatory witnesses. *See, e.g., Fuller v. Att'y General of the State of Alabama*, 36 F.Supp.2d 1323, 1324 (N.D.Ala.1999) (granting *habeas* petition where issue of petitioner's guilt had been "quite close" at trial, and where

trial counsel had failed to conduct a "basic investigation and interview" of a witness who would have provided plausible corroboration of petitioner's testimony in his own behalf). The Second Circuit has already made clear why a determination by Bisaccia's trial counsel that Farrell would not be an effective exculpatory witness cannot be considered objectively unreasonable. According to Agent Petrouskie's testimony at Bisaccia's trial, Farrell had admitted that "he had lied to Agent Petrouskie when he told him during a prior interview that he saw two men standing over the dead body and had identified those two men as Gravano and Mannino." *Stantini*, 85 F.3d at 14. With respect to Gonzalez, Bisaccia does not dispute that she would have testified that "she knows nothing about the crime," or that his trial counsel would have been unable to impeach her with hearsay statements to the contrary. (*See* Fischer Aff. ¶ 2.) Likewise, Bisaccia does not dispute that Rodriguez has never claimed that he would be able to identify the white male he saw at the scene of the murder. (*See* Rodriguez Aff. at ¶ 5.) It hardly appears that the decision of Bisaccia's trial counsel not to pursue a trial strategy relying on the testimony of either Gonzalez or Rodriguez was objectively unreasonable, much less prejudicial to Bisaccia. It follows that Bisaccia is unable to sustain a claim of ineffective assistance of trial counsel under *Strickland*.

Accordingly, Bisaccia's claims for § 2255 relief on the ground of *Brady* violations, and ineffectiveness of trial counsel due to failure to investigate exculpatory witnesses, must be denied.

Appendix C

CONCLUSION

From the vantage point of this Court, seeing yet another fruitless motion for collateral relief brought upon grounds that have been advanced before and rejected at every level of the federal judiciary, the reflections of Justice Harlan seem apposite:

> If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring).

For the foregoing reasons, the motions of Orazio Stantini and Robert Bisaccia to disqualify this Court from further proceedings in this case, for discovery and an evidentiary hearing, and to vacate, set aside, or correct their sentences pursuant to 28 U.S.C. § 2255 are denied in their entirety.

SO ORDERED.